No. 202

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MacDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO BRIEF OF APPELLANT.

LEWIS M. DABNEY, JR.,
Attorney for Appellant.

THE COURT PRESS 130 Cedar St., N. Y. C.

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Plaintiff-Appellant,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Statement Pursuant to Rule 15(b).

1. The action was commenced on May 10, 1948, on which day the complaint was filed in the Office of the Clerk of the United States District Court for the Southern District of New York.

2. The original parties were Michael Stella, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation, Plaintiff, and Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Frazer Corporation, Defendants. There has been no change of parties.

3. The respective pleadings were filed as follows:

The complaint on May 10, 1948; the answer of defendants, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Thefethen, Jr., Clay P. Bedford, O. B. Motter,

Statement Pursuant to Rule 15(b).

Hickman Price, Jr., and Walston S. Brown, on September 17, 1948; the answer of Kaiser-Frazer Corporation was filed September 17, 1948, the answer of W. A. MacDonald was filed November 16, 1948, and the answer of Joseph W. Frazer was filed February 14, 1949.

4. No property has been attached.

5. There was no trial herein. On February 11, 1954 the Hon. Sylvester J. Ryan, United Staes District Judge, rendered his opinion to the effect that summary judgment should be granted dismissing the complaint.

6. No question was referred to a Commissioner or Commissioners, Master or Referee.

7. Final judgment was entered herein February 19, 1954.

8. Notice of appeal from said judgment was duly filed March 18, 1954.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion.

ORDER TO SHOW CAUSE.

(Cert. tr., pp. 46-47.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Upon the annexed duly verified petition of Jerome R. Pergament, George J. London and Kaiser-Frazer Corpo-

ration, and upon all prior pleadings and proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show cause at a Term of this Court, to be held at Room 712 of the Federal Building, 231 W. Lafayette Street, in the City of Detroit, State of Michigan, on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made

(a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation, and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation and Permanente Products Company, dated October 25, 1949, a copy of which is annexed to said petition marked Exhibit 1;

(b) directing that the said agreement be carried out and put into effect;

(c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys;

(d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof;

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

(e) granting such other, further and different relief as to the Court may seem just and proper;

and, sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order to show cause and the annexed petition upon the attorneys of record of the respective defendants, whose offices are located within this District, on or before the 15th day of November, 1949, be deemed good and sufficient service upon said defendants, and it is further

ORDERED, that a copy of this order, of the annexed petition, of a notice of hearing in substantially the form hereto annexed marked Exhibit A, of the amended complaint and of the plaintiffs' notice of motion to amend and supplement the amended complaint, be mailed on or before the 21st day of November, 1949, by the defendant Kaiser-Frazer Corporation to each of the stockholders of said defendant of record as of the 31st day of October, 1949, and that for that purpose, the said defendant Kaiser-Frazer Corporation shall print a sufficient number of copies of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint, and it is further

ORDERED, that a notice substantially in the form of Exhibit A annexed to this order be published once by the defendant Kaiser-Frazer Corporation on or before the 23rd day of November, 1949, in the following newspapers of general circulation: the Detroit Legal News in the City of Detroit, Michigan, the New York Times in the City of New York, N. Y., the Chicago Daily News in the City of Chicago, Illinois, the San Francisco Chronicle in

the City of San Francisco, California, and the Reno Evening Gazette in the City of Reno, Nevada, and it is further

ORDERED, that the mailing of a copy of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint and the publication of said notice of hearing as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of the defendant Kaiser-Frazer Corporation pursuant to Rule 23 (d) of the Rules of Civil Procedure.

Dated, Detroit, Michigan, November 9th, 1949.

FRANK A. PICARD
United States District Judge

Exhibit 1, Annexed to Affidavit of Mark T. Hughes.

PETITION

(Cert. tr., pp. 49-52.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

To the Honorable the Judges of the United States District Court for the Eastern District of Michigan:

The petition of Jerome R. Pergament and George J. London, by Samuel L. Chess and Fischer & Fischer and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Perlman, Goodman, Hecht & Chesler, their attorneys, and of Kaiser-Frazer Corporation, by its attorneys, Butzel, Eaman, Long, Gust & Kennedy and Willkie Owen Farr Gallagher & Walton, respectfully shows to the Court as follows:

1. That your petitioners, Jerome R. Pergament and George J. London, are the plaintiffs in the above-entitled action and that your petitioner, Kaiser-Frazer Corporation, is a defendant in said action.

2. The defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr. and Kaiser-Frazer Corporation have appeared and answered. That the defendants, The Permanente Metals Corporation and Permanente Products Company have not yet answered. That by a memorandum and order entered October 12, 1949, this action has been dismissed as against the defendants United States of America and Reconstruction Finance Corporation. That the defendant Otis & Co. has been served with a summons and complaint and has made a motion to dismiss the action and to quash the return of service of process, which motion is now pending undecided. That the remaining named defendants have not been served with the summons and complaint. That the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald and Hickman Price, Jr. are hereinafter collectively referred to as the "individual defendants."

3. That on October 22, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, served and filed a notice of motion to amend and supplement the amended complaint at the opening of the trial

of the action so as to include alleged acts of misfeasance and neglect on the part of the individual defendants and others, not theretofore alleged in the amended complaint, resulting in loss and damage to your petitioner, the defendant Kaiser-Frazer Corporation.

4. That on October 25, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, and acting on behalf of themselves and on behalf of all other stockholders of the defendant Kaiser-Frazer Corporation, entered into a written agreement with your petitioner, the defendant Kaiser-Frazer Corporation, and with the individual defendants and the defendants The Permanente Metals Corporation and Permanente Products Company to dismiss and compromise this action and the claims set forth in the amended complaint and the aforesaid notice to amend and supplement the amended complaint upon the terms and conditions therein provided; including, among others, the condition that the compromise therein provided for shall be approved by this court in accordance with the provisions of Rule 23(c) of the Rules of Civil Procedure. Annexed hereto, marked Exhibit 1, is a true copy of said agreement; and annexed hereto, marked Exhibit 2, is a list of the metal presses and related equipment referred to in paragraph 1 (d) of said agreement.

5. That, in the opinion of your petitioners, said agreement provides for a fair and reasonable disposition of the claims and matters in controversy in this action and that it is in the interest of your petitioner, the defendant Kaiser-Frazer Corporation, and of your petitioners, Jerome R. Pergament and George J. London, and of all other stockholders of the defendant Kaiser-Frazer Corporation that said agreement be approved by this Court

pursuant to said Rule 23(c) and that the provisions of said agreement be carried out and put into effect.

6. That it is necessary and desirable that a hearing be held by this Court to consider said agreement and thereupon to make such order in the premises as may be just and proper, and that appropriate notice of such hearing be given to all of the parties of record and to all of the stockholders of record of the defendant Kaiser-Frazer Corporation—for all of which an order to show cause is requested.

7. That no previous application for the relief herein requested has been made to any other court or judge.

WHEREFORE, your petitioners pray

1. That an order be entered (a) approving the agreement, Exhibit 1 hereto annexed; (b) directing that the same be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; and (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attroneys and directing the payment thereof.

2. That an order to show cause issue fixing a time and place for a hearing upon this petition, and providing for appropriate notice to all the stockholders of the defendant Kaiser-Frazer Corporation of the time, place and purpose of said hearing; and

3. That the court grant to your petitioners such other,

further and different relief as to the Court may seem just and proper.

JEROME R. PERGAMENT
GEORGE J. LONDON
Plaintiffs-Petitioners.

SAMUEL L. CHESS
Samuel L. Chess,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
By Kenneth Fischer
Member of the Firm,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiffs-Petitioners.

KAISER-FRAZER CORPORATION,
By J. F. Reis
Vice-President,
Defendant-Petitioner.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,
By A. Hilliard Williams
Member of the Firm
1881 National Bank Building,
Detroit 26, Michigan.

WILLKIE OWEN FARR GALLAGHER & WALTON,
15 Broad Street,
New York 5, New York,

Attorneys for Defendant-Petitioner,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

State of New York,
County of New York—ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JEROME R. PERGAMENT

Sworn to before me this
2 day of November, 1949.

ANNA K. ROSENTHAL
Notary Public.

ANNA K. ROSENTHAL
Notary Public, State of New York
Residing in Bronx Co. No. 84, Reg. No. 233-R-0
Cert. filed in N. Y. Co. No. 296, Reg. No. 241-R-0
Commission Expires March 30, 1950

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

State of New Jersey,
County of Hudson—ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE J. LONDON

Sworn to before me this
3 day of November, 1949.

BENJAMIN KIRSHBAUM
Notary Public.
My Commission Expires March 7, 1952

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

State of Michigan,
County of Wayne—ss.:

J. F. REIS, being sworn, deposes and says that he is Vice-President of Kaiser-Frazer Corporation, defendant-petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

J. F. REIS.

Sworn to before me this
7th day of November, 1949.

ELIZABETH V. HAND
Notary Public, Wayne County, Michigan
My Commission Expires April 7, 1951.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

EXHIBIT 1

(Cert. tr., pp. 53-58.)

THIS AGREEMENT made and entered into as of this 25th day of October, 1949, by and between JEROME R. PERGAMENT and GEORGE J. LONDON (hereinafter called "the plaintiffs") and JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, CLAY P. BEDFORD, W. A. MACDONALD and HICKMAN PRICE, JR. (hereinafter called "the individual defendants") and THE PERMANENTE METALS CORPORATION and PERMANENTE PRODUCTS COMPANY (hereinafter called "the corporate defendants") and KAISER-FRAZER CORPORATION (hereinafter called "Kaiser-Frazer").

WITNESSETH:

WHEREAS, the plaintiffs have heretofore filed and there is now pending in the United States District Court for the Eastern District of Michigan an action on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similiarly situated and in the right of and on behalf of Kaiser-Frazer, which action is entitled "Jerome R. Pergament and George L. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, against Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation, Otis & Co., Cyrus Eaton, The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation, Defendants", Civil No. 7354, which action is

hereinafter referred to as "the stockholders derivative action", and

WHEREAS, on or about the 22nd day of October, 1949, the plaintiffs served a notice of intention to amend and supplement the amended complaint so as to include additional allegations and prayers for relief, and

WHEREAS, subject to the approval of the Court pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure, the parties desire to dismiss and compromise the stockholders derivative action and to resolve all of the controversies raised by the allegations of the amended complaint and the notice of intention to amend and supplement the amended complaint and the answers thereto, together with any and all matters or claims hereinafter referred to, and

WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,303.30.

2. Subject only to the provisions of paragraph 7 hereof, Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right hereby agree to release and discharge and hereby do release and forever discharge the individual defendants; the corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc., and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses,

damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against said individual defendants, corporate defendants and G. G. Sherwood, E. F. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, said Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right, ever had, now have or which they or their heirs, executors, administrators, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, including without limitation of the generality of the foregoing any and all claims, charges and allegations set forth in the amended complaint and the notice to amend and supplement the amended complaint including

(a) The purchase or authorization of the purchase by Kaiser-Frazer Corporation on or about February 3, 1948 of 186,200 shares of the common stock of Kaiser-Frazer.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

(b) All acts and transactions relating to or in connection with a proposed offering of common stock of Kaiser-Frazer, a Registration Statement covering which was made effective by the Securities and Exchange Commission on February 3, 1948.

(c) The making of certain contracts dated September 20, 1946, December 1, 1947 and December 12, 1947 between Kaiser-Frazer and Graham-Paige Motors Corporation, including all agreements supplementary and amendatory thereof and all acts and transactions under or in connection therewith, and in addition each and every transaction between Graham-Paige Motors Corporation and Kaiser-Frazer and payments made on account thereof.

(d) The following transactions of The Permanente Metals Corporation:

(i) The assignment by Kaiser-Frazer Corporation to The Permanente Metals Corporation of a certain letter of intent dated March 27, 1946 covering the proposed lease of Plancors Nos. 524 and 1061 from War Assets Administration to Kaiser-Frazer, and the subsequent lease and purchase of said Plancors Nos. 524 and 1061 by The Permanente Metals Corporation.

(ii) The procurement by Kaiser Metal Products, Inc. of a letter of intent with reference to a certain aluminum reduction plant at Head, Washington, the subsequent assignment of said letter of intent to The Permanente Metals Corporation, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iii) The procurement by The Permanente Metals Corporation of a letter of intent with reference to a certain alumina plant at Baton Rouge,

Louisiana, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iv) The procurement by The Permanente Metals Corporation of a letter of intent to purchase an aluminum fabricating plant at Newark, Ohio, and the subsequent purchase thereof by The Permanente Metals Corporation.

(v) All other transactions between Kaiser-Frazer and The Permanente Metals Corporation, including, without limitation of the generality of the foregoing purchases of aluminum by Kaiser-Frazer from The Permanente Metals Corporation; and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(e) All transactions whereunder Kaiser-Frazer leased a certain plant located at Long Beach, California from War Assets Administration, operated such plant, paid rentals thereon, maintained the same and manufactured farm equipment therein for Graham-Paige Motors Corporation, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(f) All transactions between Kaiser-Frazer and Kaiser Metal Products, Inc., including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer paid the cost of experimental work incurred by Kaiser Metal Products, Inc., paid the cost of equipment acquired and installed in the plant of said Kaiser Metal Products,

Inc., released an option to buy the plant of Kaiser Metal Products, Inc. at Bristol, Pa., permitted to remain in said plant certain equipment owned by Kaiser-Frazer and purchased, at prices claimed to have been excessive, automotive parts from Kaiser Metal Products, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(g) All transactions between Kaiser-Frazer and Kaiser Steel Corporation, including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer purchased certain steel products from Kaiser Steel Corporation and entered into and maintained in effect a management contract for the operation of a certain blast furnace at Provo, Utah, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons or corporations hereinabove in this paragraph 2 mentioned.

(h) All transactions between Kaiser-Frazer and Kaiser Industries, Inc., including, without limitation of the generality of the foregoing, transactions whereunder Kaiser-Frazer obtained engineering services from Kaiser Industries, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and other persons or corporations hereinabove in this paragraph 2 mentioned.

(i) The transaction whereunder Kaiser-Frazer on or about December 27, 1947 repaid in full the outstanding principal amount of a loan made to Kaiser-

Exhibit 1. Annexed to Affidavit of Mark F. Hughes.

Frazer by Bank of America, National Trust and Savings Association, including all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants, and the other persons or corporations hereinabove in this paragraph 2 mentioned.

3. Nothing contained in this agreement shall in anywise release or discharge Otis & Co. or any officer, director or stockholder of Otis & Co. from any claim Kaiser-Frazer may have against any one or more of them, including, without limitation of the generality of the foregoing, the action instituted by Kaiser-Frazer against Otis & Co. in the United States District Court for the Southern District of New York entitled "Kaiser-Frazer Corporation, plaintiff, against Otis & Co., defendant", Civil Action No. 45-564, and a certain counterclaim and third party complaint against James F. Masterson, Otis & Co., Cyrus S. Eaton, et al., in an action entitled "James F. Masterson, plaintiff, against Kaiser-Frazer Corporation, et al., defendants" now pending in the United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 7365. The plaintiffs recognize and agree that Kaiser-Frazer shall prosecute or otherwise dispose of such claims as in the discretion of its Board of Directors is deemed advisable.

4. Nothing contained in this agreement shall in anywise discharge or release Graham-Paige Motors Corporation from or in respect of the claim or claims asserted against said Graham-Paige Motors Corporation in an action entitled "Michael Stella against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation" pending in the United States District

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Court for the Southern District of New York, Civil Action No. 51-92 and in the action entitled "Michael Stella, plaintiff, against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation, defendants" pending in the United States District Court for the Eastern District of Michigan, Civil Action No. 8344.

5. In entering into this agreement, the individual defendants and the corporate defendants do not admit or concede the truth of or liability for any of the allegations, matters or things set forth or referred to in the amended complaint and the notice to amend and supplement the amended complaint in the stockholders derivative action or any of the matters and things referred to herein. In the event that this agreement and the compromise and settlement herein agreed to shall not be approved pursuant to Rule 23(c) of the Rules of Civil Procedure as more fully provided in paragraph 7 hereof, this agreement shall not be offered in evidence or otherwise used by or against any of the parties hereto for any purpose whatever.

6. As soon after the execution of this agreement as is feasible, the plaintiffs and Kaiser-Frazer will make an appropriate application to the District Court of the United States for the Eastern District of Michigan, Southern Division, for an order pursuant to Rule 23(c) of the Rules of Civil Procedure approving this agreement and providing for the dismissal and compromise of the derivative stockholders action in accordance with its terms.

7. This agreement is subject to the approval of the District Court of the United States for the Eastern District of Michigan, Southern Division, pursuant to the provisions of said Rule 23(c). If for any reason

the court should fail to make an order approving this agreement and dismissing and compromising the stockholders derivative action in accordance with its terms, this agreement and all of the terms and conditions hereof shall be null and void and of no force and effect whatsoever and none of the parties hereto shall be bound or prejudiced thereby.

8. The parties agree that they shall execute any further agreements and writings and perform any and all acts necessary or proper to carry out the purpose and intentions of this agreement.

9. This agreement may be executed in any number of counterparts, any one of which when executed by any of the parties hereto shall be deemed an original for all purposes. If any of the individual defendants or corporate defendants should fail to enter into this agreement, it shall nevertheless be effective as to all of the parties signatory hereto; and, in such event, any such individual defendant or corporate defendant shall be entitled to the benefits of paragraph 2 hereof.

IN WITNESS WHEREOF, the individual parties have hereunto set their hands and seals and the corporate defendants and Kaiser-Frazer Corporation have caused these presents to be executed by their duly authorized officers as of the day and year first above written.

JEROME R. PERGAMENT (L. S.)
Jerome R. Pergament

GEORGE J. LONDON (L. S.)
George J. London

On their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated

Exhibit 1. Annexed to Affidavit of Mark F. Hughes.

JOSEPH W. FRAZER (L. S.)
Joseph W. Frazer

HENRY J. KAISER (L. S.)
Henry J. Kaiser

EDGAR F. KAISER (L. S.)
Edgar F. Kaiser

CLAY P. BEDFORD (L. S.)
Clay P. Bedford

W. A. MACDONALD (L. S.)
W. A. MacDonald

HICKMAN PRICE, JR. (L. S.)
Hickman Price, Jr.

THE PERMANENTE METALS CORPORATION
By E. E. TREFETHEN, JR.
Vice-President

PERMANENTE PRODUCTS COMPANY
By E. E. TREFETHEN, JR.
Vice-President

KAISER-FRAZER CORPORATION
By J. F. REIS
Vice-President

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

AMENDED COMPLAINT.

(Cert. tr., p. 61.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Plaintiffs suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, by their attorneys, Samuel L. Chess and Fischer & Fischer, and Perlman, Goodman, Hecht &

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Chesler, for their amended complaint herein respectfully show and allege upon information and belief, except as to paragraph "1", which is alleged on personal knowledge:

(Cert. tr., pp. 64-69.)

For a Second Cause of Action against defendants Joseph W. Frazer, Henry J. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Otis & Co., Cyrus Eaton and Kaiser-Frazer Corporation:

15. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" and "2" hereinabove as though herein set forth at length.

16. Plaintiffs repeat and reallege each and every allegation set forth in paragraph "4" hereinabove as though herein set forth at length and further allege that defendant Cyrus Eaton resides in the City of Northfield, State of Ohio.

17. Defendant Otis & Co. is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at such times had and still has offices for the transaction of business in the County, City and State of New York and in the City of Detroit, Michigan. Defendant Cyrus Eaton is and at all times hereinafter mentioned was a director, officer and one of the principal stockholders of said defendant Otis & Co.

18. Prior to February 3, 1948 defendant Kaiser-Frazer contemplated a public issue of 1,500,000 shares of the common stock of said Kaiser-Frazer at a price to the public of $13 per share, and in that connection arrangements had been made with defendant Otis & Co. and with

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

First California Company and Allen & Company as underwriters under which said underwriters were to acquire such shares under a firm commitment at a price to yield to defendant Kaiser-Frazer $11.50 per share and to yield to said underwriters, when and if they disposed of said stock, underwriting discounts and commissions in the amount of $1.50 per share. It was contemplated by the parties that the stock would be offered to the public on February 4, 1948 and that the underwriting agreement would be signed prior thereto.

19. On or prior to February 2, 1948 defendants Otis & Co. and Cyrus Eaton advised the officers and directors of Kaiser-Frazer that the proposed underwriting agreement would be executed by the underwriters if and only if defendant Kaiser-Frazer undertook during the day of February 3, 1948 to "stabilize" the market in the stock of Kaiser-Frazer at $13.50 per share, and advised the officers and directors of Kaiser-Frazer that such "stabilization" operations would involve the acquisition by Kaiser-Frazer of no more than 25,000 shares of its stock on the market. Said defendants, moreover, undertook to conduct said stabilization operations on behalf of defendant Kaiser-Frazer. Arrangements were made, accordingly, that such "stabilization" operations be conducted on February 3 through the acquisition by defendant Kaiser-Frazer of its own stock on the market so as to maintain a market price of $13.50 per share, and that such operations be conducted by defendants Eaton and Otis & Co. on behalf of defendant Kaiser-Frazer.

20. During the course of the following day, namely, February 3, 1948, said "stabilization" operations were conducted as per the aforesaid arrangements, but it soon became apparent that such operations would necessitate the acquisition by defendant Kaiser-Frazer of increasingly larger numbers of its own shares on the market and,

accordingly, defendants Eaton and Otis & Co. advised the acquisition of increasingly large numbers of shares and obtained the authorization from the officers and directors of Kaiser-Frazer to acquire such shares on behalf of defendant Kaiser-Frazer. By the end of said day, namely, February 3, 1948, there had been acquired in pursuance of said "stabilization" operations by and on behalf of defendant Kaiser-Frazer a total of 186,200 shares of the stock of defendant Kaiser-Frazer at a cost to defendant Kaiser-Frazer in the neighborhood of $2,500,000.

21. Said "stabilization" operations were in truth and in fact conducted for the purpose of inducing the purchase by the public of the stock proposed to be offered by defendant Kaiser-Frazer, were for the purpose and had the effect of creating an artificial market in the stock of said defendant Kaiser-Frazer, and were conducted in such manner and by such means as to peg or rig the price of said stock on the national securities exchanges, the facilities of which were used by the public for the sale and acquisition of said stock and were conducted in such manner as to violate various provisions of Sections 9, 10 and 17 of the Securities Exchange Act of 1934 and the rules promulgated in pursuance thereof. Moreover, defendants in causing defendant Kaiser-Frazer to make such substantial acquisitions of its own stock on the market for the purposes and with the effect aforesaid, knew or should have known that their conduct was improper and unlawful and that they were jeopardizing the interests of defendant Kaiser-Frazer, particularly inasmuch as the stock thus acquired was worth substantially less than the price paid therefor.

22. On said date, namely, February 3, 1948, defendants Eaton and Otis & Co., anticipating difficulty in the dispo-

sition of the 1,500,000 shares of stock which it had been arranged that the underwriters were to acquire from defendant Kaiser-Frazer for sale to the public; and believing that their conduct as herein set forth might facilitate the disposition of such stock, wrongfully and fraudulently notified many persons, firms and corporations of the aforesaid "stabilization" operations being conducted on behalf of defendant Kaiser-Frazer, and advised and counseled them then and there and on that day to dispose of such stock of Kaiser-Frazer as they had on the market which was being pegged at $13.50 per share, and advised and counseled them that on the following day, when the underwriters offered the stock to the public, they would be able to acquire such stock at $13.00 per share and thereby make a profit for themselves. Such wrongful, fraudulent and clandestine advice and counsel to such persons, firms and corporations accounted for the great activity in the market of the stock of defendant Kaiser-Frazer, and accounted for the necessity on the part of Kaiser-Frazer to acquire such large block of stock, as aforesaid, in its "stabilization" operations.

23. Thereafter, on February 3, 1948, and after the close of the market, defendants Eaton and Otis & Co. advised the officers and directors of defendant Kaiser-Frazer that the underwriters were unwilling to sign the agreement calling for their acquisition of 1,500,000 shares of the stock of Kaiser-Frazer and, accordingly, arrangements were then made to modify said agreement so as to require said underwriters to acquire 900,000 shares of stock under a firm commitment giving them the option to acquire the additional 600,000 shares of stock under what was described as a "best efforts" deal, *i. e.*, that they were to use their best efforts to dispose of the additional 600,000 shares of stock, but if they were unable to do so they would not be required to acquire same. Said agreement as so modified

was thereupon and on said day, namely, February 3, 1948, signed by the Underwriters and by defendant Kaiser-Frazer. In truth and in fact the said underwriters, including the defendant Otis & Co., were at that time, and by reason of the circumstances hereinabove related, estopped both in fact and in law from refusing to sign the original agreement calling for their acquisition of 1,500,000 shares of the common stock of defendant Kaiser-Frazer, and in making the aforesaid compromise arrangement the officers and directors of defendant Kaiser-Frazer acted negligently and in disregard of the best interests of defendant Kaiser-Frazer but under duress practiced upon them by defendants Eaton and Otis & Co.

24. On the following day, namely, February 4, 1948, and on the days following that date, the underwriters, particularly Otis & Co., found it impossible to dispose of the shares which they had agreed to acquire from defendant Kaiser-Frazer, and said defendant Otis & Co. importuned the officers and directors of defendant Kaiser-Frazer to relieve the underwriters of their commitments, but the directors and officers of Kaiser-Frazer were unwilling to do so. The underwriting agreement, which provided for the closing on February 9, 1948, provided also in substance that on or prior to the closing an opinion should be received from counsel for Kaiser-Frazer in form and substance satisfactory to counsel for Otis & Co., to the effect that except as set forth in the prospectus filed with the Securities and Exchange Commission covering the shares to be sold by the underwriters, there was not to the knowledge of counsel any material pending legal proceedings required to be set forth in the prospectus to which Kaiser-Frazer was a party, and that no such proceedings were contemplated. In an effort to relieve itself of its underwriting commitment said defendant Otis

& Co., wrongfully and fraudulently caused to be instituted in the Circuit Court for the County of Wayne, State of Michigan, in Chancery, an action entitled "James F. Masterson, Plaintiff, vs. Kaiser-Frazer Corporation, et al., Defendants", the complaint in said action being filed on the morning of February 9, 1948. Defendant Otis & Co., using the filing of said complaint as a pretext, refused to consummate the underwriting agreement and induced one of its co-underwriters, namely, First California Company, similarly to refuse to consummate said underwriting agreement.

25. At the times hereinabove mentioned the following defendants were directors and officers of defendant Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, C. B. Motter, and Hickman Price, Jr. Said defendants and one Walston S. Brown were the officers and directors acting for and on behalf of defendant Kaiser-Frazer in the aforesaid transactions.

26. In the aforesaid transactions the directors and officers of defendant Kaiser-Frazer, all of whom except for Walston S. Brown are defendants herein, acted negligently, wrongfully and unlawfully in that they caused Kaiser-Frazer to embark upon the so-called "stabilization" operations which were in fact in violation of the Securities Exchange Act of 1934, and in causing said defendant Kaiser-Frazer to acquire its own stock not only at a price far in excess of the value thereof, but at a time when it could ill afford the loss of the use in its business operations of the $2,500,000 which said acquisition entailed; in that they undertook such "stabilization" operations in advance of a written agreement with the underwriters committing them to the purchase from

defendant Kaiser-Frazer of 1,500,000 shares of stock upon the terms as arranged; and in that they permitted themselves to be induced to modify said underwriting arrangement after the conduct of said so-called "stabilization" operations, as aforesaid. In the aforesaid transactions the defendants Eaton and Otis & Co. acted wrongfully, unlawfully and fraudulently in that they induced defendant Kaiser-Frazer to conduct the aforesaid unlawful so-called "stabilization" operations, and actually conducted said operations on behalf of said defendant Kaiser-Frazer; in that while said so-called "stabilization" operations were being conducted they advised and counseled various persons, firms and corporations to dispose of their holdings of stock of Kaiser-Frazer, as aforesaid; in that after said so-called "stabilization" operations had been conducted they wrongfully failed and refused to sign the agreement calling for a commitment on the part of the underwriters to acquire the 1,500,000 shares of stock of defendant Kaiser-Frazer, as aforesaid, and by duress practiced on the officers and directors of defendant Kaiser-Frazer Corporation induced the aforesaid modification of said agreement; and in that they wrongfully inspired and caused to be commenced the aforesaid Masterson action and used same as a pretext for failing to abide by the modified underwriting agreement, and also caused one of its co-underwriters, namely, First California Company, to similarly refuse to abide by said modified underwriting agreement. The aforesaid conduct by all of the said defendants has resulted in serious damage to defendant Kaiser-Frazer Corporation, both direct and consequential, in an amount unknown to these plaintiffs, but believed to be in excess of $15,000,000. Such damages embrace, amongst other things, the losses to defendant Kaiser-Frazer Corporation resulting from its expenditure of $2,500,000 in acquiring its own stock at a price in excess

of the value thereof and resulting in its inability to use said funds in the normal operations of its business at a time when such funds were necessary to such operations; the loss of profits by defendant Kaiser-Frazer entailed by the deterioration of its good will resulting from the aforesaid machinations of the defendants; the losses to defendant Kaiser-Frazer entailed by the refusal of defendants Eaton and Otis & Co. to abide by the original underwriting arrangements, pursuant to which the underwriters were to acquire from defendant Kaiser-Frazer and pay for 1,500,000 shares of the stock of Kaiser-Frazer; and the failure and refusal, upon the pretext of the Masterson suit, to comply even with the modified underwriting agreement.

27. Defendant Kaiser-Frazer has as a plaintiff instituted an action against Otis & Co. in the Supreme Court of the State of New York, which action has been removed to the United States District Court for the Southern District of New York, in which it seeks to require Otis & Co. to abide by the modified underwriting agreement and in which it seeks also damages from said defendant Otis & Co. for inducing First California Company to repudiate its obligations under the modified underwriting agreement. The said action, which is extremely limited in scope, does not seek the relief sought on behalf of defendant Kaiser-Frazer by the plaintiffs herein for the reason that the officers and directors of defendant Kaiser-Frazer, defendants herein, are involved and are implicated in the wrongful conduct hereinabove alleged resulting in damage to defendant Kaiser-Frazer far in excess of that sought by the complaint in the aforesaid action and for which, as aforesaid, said officers and directors of defendant Kaiser-Frazer are liable along with defendants Eaton and Otis & Co.

Exhibit 1, Annexed to Affidavit of Mark F. Hawkes

28. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute action on behalf of Kaiser-Frazer for the relief sought herein, because the said officers and directors of Kaiser-Frazer are involved and implicated in and are responsible for the aforesaid transactions and are liable therefor to defendant Kaiser-Frazer: In connection with the aforesaid transactions they acted negligently, wrongfully and unlawfully to the damage of defendant Kaiser-Frazer Corporation, as aforesaid; they (except for Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

29. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

30. Exclusive of interest and costs the matter in controversy in this action excees the sum of $3,000.

31. Plaintiffs have no adequate remedy at law.

* * * *

(Cert. tr., pp. 74-75.)

WHEREFORE, plaintiffs respectfully pray for judgment as follows:

(a) That defendants and each of them other than defendant Kaiser-Frazer Corporation account for their acts and conduct as directors and officers of said defendant Kaiser-Frazer Corporation and as conspirators in respect of and participants in said acts and conduct, and that they be directed to account for all moneys, assets, facilities and property of said defendant Kaiser-Frazer Corporation which were negligently, wrongfully, unlawfully and fraudulently wasted, diverted, misapplied, mis-

appropriated and lost, and that they be directed to pay over and to restore to said defendant Kaiser-Frazer Corporation any and all sums of money thus accounted for;

(b) That is be decreed and adjudged that defendant, The Permanente Metals Corporation holds the aforesaid lease on the Trentwood plant in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said lease to and for the benefit of defendant, Kaiser-Frazer Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of the Trentwood plant, and the sale of products manufactured thereat;

(c) That defendants and each of them other than defendant Kaiser-Frazer Corporation be directed to account for all secret gains, profits, advantages and benefits received by them, or any of them, directly or indirectly, through the wrongful, improper and illegal use of the moneys, assets, facilities and property of defendant Kaiser-Frazer Corporation and that they be directed to repay, restore and pay over all such moneys and properties so acquired or the value thereof;

(d) That defendants and each of them, other than defendant Kaiser-Frazer Corporation, account to said defendant Kaiser-Frazer Corporation, for their acts and conduct herein complained of, and that they be directed to pay over and restore to said defendant Kaiser-Frazer Corporation all losses occasioned by their acts and conduct, and all profits or gains realized by them by said acts and conduct;

(e) That plaintiffs be given such other and further

relief as may be just and proper in the premises, together with the costs and disbursements of this action.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiffs.

State of New York,
County of New York—ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

JEROME R. PERGAMENT.
Jerome R. Pergament.

Sworn to before me, this
22nd day of July, 1948.

MARTIN M. CHESS
Martin M. Chess
Commissioner of Deeds N. Y. City
N. Y. Co. Clk's No. 8 Reg. No. 0-C-43
Bronx Co. Clk's No. 2 Reg. No. 0-C-17
Kings Co. Clk's No. 26 Reg. No. 50-C-31
Commission Expires Jan. 27, 1950

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

State of New Jersey,
County of Hudson—ss.:

GEORGE J. LONDON, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GEORGE J. LONDON.
George J. London.

Sworn to before me, this
22nd July, 1948.

EDWARD J. SCANLON
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

(NOTARIAL SEAL)

Exhibit 1. Annexed to Affidavit of Mark F. Hughes.

NOTICE.

(Cert. tr., pp. 78-83.)

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.
Civil Action File No. 7354.

JEROME R. PERGAMENT, et al.,
Plaintiffs,

v.

JOSEPH W. FRAZER, et al.,
Defendants.

To:

BUTZEL, EAMAN, LONG, GUST & KENNEDY, Esqs.,
1881 National Bank Building,
Detroit 26, Michigan,
Attorneys for Kaiser-Frazer Corporation,
and certain individual defendants.

BODMAN, LONGLEY, BOGLE, MIDDLETON &
ARMSTRONG, Esqs.,
1400 Buhl Building,
Detroit 26, Michigan,
Attorneys for Graham-Paige Motors Corporation.

GEORGE E. BRAND, Esq.,
3709-3723 Barlum Tower,
Detroit 26, Michigan,
Attorney for The Permanente Metals Corporation
and Permanente Products Company.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

DYKEMA, JONES & WHEAT, Esqs.,
2746 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Otis & Co.

Gentlemen:

PLEASE TAKE NOTICE that upon the trial of the above entitled action, the undersigned, on behalf of the above named plaintiffs, will move to amend and supplement the amended complaint herein so that same shall include the following allegations and prayers for relief:

I.

Following Paragraph 40 of the said amended complaint:

40a. Thereafter and in or about the month of October, 1949, said defendant, Permanente Metals, then being in possession of the Trentwood Rolling Mill under said lease, acquired title to said plant from the lessor thereof or some other agency of the United States, and, at or about the same time, the said defendant, then being in possession of the Mead and Baton Rouge plants, under leases, also obtained title to said plants, all as more fully described hereinafter, the purchase price being paid by payment of a small percentage of the total thereof and by agreement to pay the balance in installments partly in cash and partly through the delivery to the government of aluminum ingots.

40b. Under the letter agreement referred to in Paragraph 38 of the amended complaint, which was dated March 27, 1946, the War Assets Administration also agreed to lease, not to Kaiser-Frazer, but to, Kaiser Cargo, Inc., a company in which Henry J. Kaiser and his associates were and still are officers and directors and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

principal or sole stockholders (and the name of which was subsequently changed in 1946 to Kaiser Fleetwings Inc., and again later changed to Kaiser Metal Products Corporation), the so-called Spokane, Washington reduction plant, at Mead, Washington, near Spokane, which plant is herein referred to as the Mead plant. Furthermore, on August 16, 1946, Kaiser Cargo, Inc., obtained from War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser Cargo, Inc., a plant at Baton Rouge, Louisiana, herein referred to as the Baton Rouge plant, with facilities for the production of alumina from bauxite ore. Kaiser Cargo, Inc., assigned these agreements to Permanente Metals, which, pursuant thereto, obtained leases on said plants (on the Mead plant on July 19, 1946, and on the Baton Rouge plant on November 1, 1946); and thereafter and in or about October, 1949, said defendant, Permanente Metals, acquired title to said plants, along with the Trentwood plant, as alleged in Paragraph 40a hereof.

40c. The said three (3) plants, namely, the Trentwood plant, the Mead plant and the Baton Rouge plant, had been built by the United States Government in 1942 and 1943, built by the United States Government in 1942 and use and operation. The Baton Rouge plant, as aforesaid, had facilities for the production of, and did produce, alumina from bauxite ore. The Mead plant was designed to and did produce primary aluminum in pig form from alumina produced at the Baton Rouge plant. At the Trentwood plant, the aluminum pig produced at the Mead plant was and is remelted and manufactured into finished or semi-finished aluminum products. In making the aforesaid agreements and leases, and ultimate sales of the said plants, it was the purpose of the government to foster a new and fully integrated enterprise which could become a completely independent operator, so that

competition in the aluminum industry could be effectually furthered, and said plants were all put in operating condition at the cost and expense of the government, and without expense to Permanente Metals.

40d. In or about the month of June, 1949, and to supplement the operations of Permanente Metals at the Trentwood, Mead and Baton Rouge plants, Permanente Metals acquired from the United States, through War Assets Administration, an aluminum rod and bar mill at Newark, Ohio.

40e. Not only was the letter of intent of March 27, 1946, with respect to the Trentwood plant made with Kaiser-Frazer, but to the knowledge of the defendants, the opportunities to obtain leases on the Mead and Baton Rouge plants, and ultimately to acquire said Trentwood, Mead and Baton Rouge plants, and the opportunity to acquire the aforesaid mill at Newark, Ohio, were opportunities which were offered to or were readily available to Kaiser-Frazer, and they were opportunities which in the light of the above facts and others, and particularly the existence of a large demand for aluminum products, and the possession of or availability to Kaiser-Frazer of the resources and facilities necessary to exploit said opportunities, and the assurance of substantial profits, should and could have been taken and exercised on behalf of Kaiser-Frazer, and would have been so taken and exercised, if the directors and officers of Kaiser-Frazer had properly exercised their fiduciary duties to Kaiser-Frazer. In causing said Kaiser-Frazer to relinquish or be deprived of said opportunities and in enabling them to be taken and exercised on behalf of Kaiser Cargo, Inc. (now known as Kaiser Metal Products Corporation), and Permanente Metals, the directors and officers of Kaiser-Frazer acted with gross negligence, with reckless indif-

ference to the rights and interests of Kaiser-Frazer, and in violation of their duties to Kaiser-Frazer, and in wrongful and fraudulent conspiracy with Kaiser Cargo, Inc. (now known as Kaiser Metals Products Corporation), and Permanente Metals, and the officers and directors thereof, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser companies which had the majority stock interests in Permanente Metals, the aforesaid common directors of Kaiser-Frazer and Permanente Metals and other business associates of the Kaisers. The aforesaid profits made by Permanente Metals, referred to in Paragraph 39 of the amended complaint, and the profits thereafter made, were enabled to be made in part through the operations of the Mead and Baton Rouge plants and the mill at Newark, Ohio, as well as the operations of the Trentwood plant.

The following paragraph is to be substituted for Paragraph 41 contained in said amended complaint:

41. By reason of the premises, Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds the said Trentwood, Mead and Baton Rouge plants and the Newark, Ohio, mill in trust for Kaiser-Frazer; that title to said plants and mill be assigned, transferred and set over to and for the benefit of Kaiser-Frazer, upon the assumption by Kaiser-Frazer of the obligations incurred under any purchase agreements by Permanente Metals; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operations of said plants and mill, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser Companies", as aforesaid; and that all defendants shall

ilarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transactions herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned subsidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits and damages herein requested will be facilitated thereby.

II.

To add a Fourth Cause of Action to said amended complaint, which said cause of action shall read as follows:

For a Fourth Cause of Action against Defendants, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. R. Motter, Hickman Price, Jr., and Kaiser-Frazer Corporation:

46. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 1 (as heretofore amended by "Amendments to Amended Complaint", filed and served January 12, 1949), 2 and 4 of the amended complaint as though herein set forth at length.

47(a) The directors and officers of Kaiser-Frazer have caused Kaiser-Frazer to make various arrangements with Kaiser Fleetwings Inc., a company owned and controlled by Henry J. Kaiser and his business associates, as aforesaid (the name of which was theretofore Kaiser Cargo, Inc., and which has since been changed to Kaiser Metal Products Corporation), under which said Kaiser Fleetwings Inc. performed for Kaiser-Frazer various aspects

of the work necessary in the manufacture of automobiles and the parts thereof, including doors and deck lids, and under which said Kaiser Fleetwings Inc. sold to Kaiser-Frazer doors and deck lids for use in automobiles manufactured by Kaiser-Frazer. In connection with said agreements, and pursuant thereto, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to acquire and furnish to Kaiser Fleetwings Inc. machinery and other equipment aggregating millions of dollars in cost and value for use by Kaiser Fleetwings Inc. in manufacturing said automobile parts for Kaiser-Frazer. In these transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the work done by Kaiser Fleetwings Inc. for Kaiser-Frazer, and the products sold to Kaiser-Frazer by Kaiser Fleetwings Inc., prices which were far in excess of the fair and reasonable value of said work, and the market or fair and reasonable value of said products, and in addition Kaiser-Frazer could and should have obtained said work and products from other sources without the substantial investment in machinery and equipment acquired and furnished for the use of Kaiser Fleetwings Inc., as aforesaid.

(b) In causing Kaiser-Frazer to make said arrangements with Kaiser Fleetwings Inc., the directors and officers of Kaiser-Frazer were acting in a manner detrimental to the interests of Kaiser-Frazer for the benefit, advantage and unjust enrichment of Kaiser Fleetwings Inc., and said directors and officers of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and said acts and activities and the arrangements made, as aforesaid, resulted in damages to Kaiser-Frazer, and a waste of its funds and assets in an amount now not known to plaintiffs, but for which the individual defendants are accountable, and should be compelled to account to Kaiser-Frazer.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

48. In or about the month of June, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make an agreement with Graham-Paige Motors Corp., wherein and whereby the funds, moneys and credits of Kaiser-Frazer were used in whole or in part to finance a business venture on the part of Graham-Paige, at Long Beach, California, for the manufacture of farm equipment. Kaiser-Frazer had no interest in said venture, nor any expectancy therein, and said arrangement to finance said venture was wholly outside the legitimate scope of the activities of Kaiser-Frazer. The use of the moneys, funds and credits of Kaiser-Frazer in connection with said venture was intended to advantage Graham-Paige at the expense of and to the detriment of Kaiser-Frazer, and the acts of the directors and officers of Kaiser-Frazer in causing Kaiser-Frazer's moneys, funds and credit so to be used, were wrongful and fraudulent and in violation of their fiduciary duties to Kaiser-Frazer, and have resulted in damage to Kaiser-Frazer, and a waste of its funds and assets for which the individual defendants herein are accountable to and should be made to account to Kaiser-Frazer.

49. (a) Under date of April 1, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to lease from the United States Government certain buildings located at Long Beach, California (formerly part of an aircraft manufacturing plant owned by the government, and operated by Douglas Aircraft Company). Said lease was for a term of four years, and eleven months, with an option to renew for an additional five year term. The annual rent was $115,793 for the first year, $173,690 for the second year and $231,856 for each year thereafter. By letter of intent dated February 12, 1947, the War Assets Administration agreed to enter into an amendment under which certain additional property would be

included in the leased premises, the rental would be increased $63,836 per annum, and Kaiser-Frazer would be granted an option to purchase the property for $3,000,000. Said property was leased for the purpose of having it available as a west coast assembly plant for Kaiser-Frazer. The directors and officers of Kaiser-Frazer caused approximately $2,200,000 of the moneys of Kaiser-Frazer to be expended for the equipment of said plant. In the Fall of 1946, work on said plant was suspended and since that time, nothing further has been done or performed in connection therewith. However, the rent at the rates provided as above have continued to run and have continued to be paid by Kaiser-Frazer.

(b) In causing Kaiser-Frazer to make the aforesaid lease, the directors and officers of Kaiser-Frazer acted negligently, improvidently and recklessly and without sufficient or proper evaluation of the needs of Kaiser-Frazer and the ability of Kaiser-Frazer to properly equip said plant in order to enable it to function and to put it in effective operation. As a result of said transaction, Kaiser-Frazer has sustained damages running into millions of dollars for which the directors and officers of Kaiser-Frazer are accountable to and should be made to account to Kaiser-Frazer.

50. (a) In or about the months of May and June, 1946, and from time to time thereafter until the Fall of 1947, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases of steel ingots from Kaiser Steel Co., Inc. (the name of which has since been changed to Kaiser Steel Corporation), a corporation owned and controlled by Henry J. Kaiser and his business associates, in quantities which were excessive and not needed in the busines

(b) In or about the Fall of 1947, and from time to time thereafter, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases and continue to purchase from said Kaiser Steel Co., Inc., slab steel in quantities which were excessive and not needed in the business of Kaiser-Frazer.

(c) In the aforesaid transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the steel sold to Kaiser-Frazer by said Kaiser Steel Co., Inc., prices which were far in excess of the market or the fair and reasonable value thereof. In causing Kaiser-Frazer to engage in said transactions with said Kaiser Steel Co., Inc., the directors of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and with the intent of benefiting and advantaging Kaiser Steel Co., Inc., at the expense of and to the detriment of Kaiser-Frazer. Said transactions have resulted in damage to Kaiser-Frazer in an amount now unknown to plaintiffs, but for which said individual defendants are accountable to and should be made to account to Kaiser-Frazer.

51. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 28, 29, 30 and 31 of the amended complaint as though herein set forth at length.

III.

With respect to the prayers for relief substitute the following for Paragraph (b) of the prayer for judgment, as contained in the amended complaint:

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation, hold the Trentwood, Mead and Baton Rouge plants, and the mill at Newark,

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Ohio, in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said plants and mill to and for the benefit of defendant, Kaiser-Frazer Corporation, upon the assumption by Kaiser-Frazer Corporation of the obligations incurred under any purchase agreements by The Permanente Metals Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of said plants and mill and the sale of products manufactured thereat; and that the defendants and each of them, other than defendant Kaiser-Frazer Corporation, be directed to account for all profits realized by them and all damages sustained by Kaiser-Frazer Corporation as the result of the wrongful and fraudulent diversion of the said plants and mill, and the opportunity to profit therefrom, from Kaiser-Frazer Corporation to The Permanente Metals Corporation.

Dated, October 22, 1949.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago 3, Illinois.

Attorneys for Plaintiffs.

Affidavit of Lewis M. Dabney, Jr., Read in Opposition to Motion.

(Cert. tr., pp. 109-138.)

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

—against—

HENRY J. KAISER, JOSEPH H. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

State of New York,
County of New York—ss.:

LEWIS M. DABNEY, JR., being duly sworn, deposes and says:

I am one of the attorneys of record for the plaintiff herein and make this affidavit in opposition to defendants' motion for summary judgment filed herein.

The issue on this motion is whether plaintiff is precluded by certain prior proceedings in another jurisdiction (referred to hereinafter as "the Detroit proceedings") from trying the case upon the merits. The motion is based upon the approval of a settlement in the United States District Court at Detroit, pursuant to section 23 (c) F. R. C. P., of certain stockholder actions in behalf of

Kaiser-Frazer Corporation (Kaiser-Frazer) including one which was based on the transaction pleaded in the instant action. I participated in the Detroit proceedings and in the subsequent appeal therefrom.

The said Detroit proceedings are reported in *Pergament et al., etc.* v. *Frazer, et al.*, 203 F. 2d 315 (6 Cir. 1953); decision below in 93 F. Supp. 13. They resulted in an order approving the settlement agreement which is set out in Exhibit 1 annexed to the moving papers herein, which agreement purported, among other things, to give the release which is hereinafter discussed in detail.

As appears from the moving affidavit herein, the ground of motion is that approval of the settlement agreement in the Detroit proceedings has made its terms effective, "including the provision in paragraph 2 thereof releasing and discharging" various individuals and corporations from all further liability (moving affidavit of Hughes, p. 4). The position of the movants is, apparently, that the approval of the release in the Detroit proceedings has made its validity and effectiveness res judicata, and that the plaintiff herein is therefore barred and foreclosed from further prosecution of the case at bar. The position of the plaintiff herein is that, for the reasons hereinafter set forth, approval of the release did not have the effect claimed for it, and that the Detroit proceedings do not constitute a bar to the further prosecution of the instant action.

The issue of res judicata will constitute the basic issue upon the present motion. Such a plea, of course, brings before the Court two questions: (1) what was adjudicated in the prior proceeding, (2) whether the prior adjudication was of such character as to bar a subsequent proceeding. In this affidavit I shall set forth the facts, showing that in neither aspect did the Detroit proceedings result in barring the further prosecution of the present action.

Affidavit of Lewis M. Dabney, Jr.

PRELIMINARY STATEMENT

The action at Bar is a stockholders' derivative suit to recover on behalf of Kaiser-Frazer against its officers and directors, damages for waste of corporate funds in connection with an illegal market manipulation of the stock of Kaiser-Frazer. The complaint charges that in connection with a contemplated public offering of 1,500,000 additional shares of Kaiser-Frazer common stock on February 3, 1948, the individual defendants as officers and directors of Kaiser-Frazer caused it to stabilize the market in the stock at 13½ with the result that it bought 186,200 shares of stock at a cost in excess of $2,500,000. The complaint further charges that these transactions were violative of the anti-manipulative and anti-fraud sections of the Securities Exchange Act of 1934, and were either a deliberate or a negligent waste of the funds of Kaiser-Frazer by the individual defendants.

In *Stella* v. *Kaiser-Frazer*, 82 F. Supp. 301, Judge Leibell sustained the complaint herein as alleging a good cause of action, both under the Securities Exchange Act of 1934 and at common law; and he also overruled defendants' pleas to the venue, and motions to quash extraterritorial service, holding that the special venue and service provisions of that Act apply to this case.

The instant action was one of a group of stockholders' suits filed on behalf of Kaiser-Frazer which collectively presented eight claims against its officers and directors. These suits were:

(A) The Masterson suit filed on February 9, 1948 which covered all the claims, settlement of which was approved in Detroit, with the exception of the claim based on the so-called "Permanente" transaction.

(B) The instant suit which was filed on May 10, 1948.

(C) The Lefker suit which was filed in the Chancery Court in Delaware on June 30, 1948, involving the Permanente cause of action; and

(D) The Otis & Co. suit which was filed in the Federal Court in Delaware on July 2, 1948, also involving the Permanente cause of action.

In addition to the above suits there was filed, in Detroit, the Pergament action which was used as the vehicle for the settlement upon which the movants are relying in their present motion. This, too, was a stockholder's derivative suit. It was filed May 14, 1948, before the Lefker and Otis actions; however, the Pergament action did not originally include the Permanente claim, but brought it in by amendment filed September 13, 1948. Even as amended, however, the Pergament complaint, at the time when the settlement negotiations took place, omitted to plead claims set out in the other complaints and thereafter held to be meritorious.

In this state of affairs, the individual defendants, Henry Kaiser et al. (Kaiser being the dominant figure who then controlled and now controls Kaiser-Frazer) sought out, and negotiated a settlement with, counsel for Pergament. The attorneys for the individual defendants deliberately excluded from these negotiations counsel for plaintiff herein and counsel for the plaintiffs, Masterson, Lefker and Otis & Co.; and they exacted from Pergament's attorneys a pledge of secrecy respecting the negotiations. Three days before the settlement agreement was signed, counsel for the individual defendants persuaded Pergament's attorneys to file an amendment presenting claims not theretofore included in the Pergament complaint. The admitted purpose of these additions was to include these claims in the settlement for no additional consideration. The claim in the case at bar was also thrown in for no additional consideration, under the belief (later

testified to in Detroit) that it was "a very weak cause of action" (925)[1]. The District Court held that this claim was "absolutely without merit"; but the Court of Appeals, on appeal, declared the instance claim to be meritorious.

The negotiations leading to the settlement were marked by lack of arms length bargaining and deliberate concealment of material facts, such as to make the settlement constructively, if not actually, fraudulent. This is discussed at length by Allen, *J.*, in 203 F. 2d at pp. 319-324, as hereinafter set out. (It being immaterial, when fiduciaries' misconduct is in question, whether their fraud was "constructive" or "actual", I shall not try to distinguish between the two categories in my further discussion of the facts.)

As a result of such fraudulent tactics, a settlement was made of the claims asserted in the Pergament action, and, in addition, of those brought in by amendment three days before settlement. This may have been a permissible maneuver if performed by attorneys representing only the individual defendants. It becomes an impermissible breach of fiduciary duty, as pointed out by Judge Allen, when performed by lawyers *paid by*, and *purporting to represent Kaiser-Frazer, yet acting adversely to its interest.*

The settlement of the Pergament suit, so negotiated, was brought on in Detroit by a Notice to Show Cause addressed to all stockholders of Kaiser-Frazer. The settlement was approved by the District Judge, in a proceeding in which, as hereafter shown, he took the position that he was passing on a matter of business judgment rather than conducting a trial in the ordinary sense. Upon appeal such approval was affirmed as within the discretion of the District Judge. Judge Allen, dissenting, set forth undisputed circumstances in the negotiations which, she wrote,

---

[1]This reference, and other references unless otherwise explained are to the pages of the printed record of the Detroit proceedings.

made the settlement constructively fraudulent and therefore ineligible for approval by the District Judge. The majority did not disagree as to fraud; they held that the approval of the District Judge was nevertheless within his discretion for the following reasons: The settlement, they said, could not become effective without the approval of the District Judge under Rule 23(e); he was, therefore, "a third party to the compromise" and no fraud was practiced *upon him;* accordingly he could, in his discretion, approve the compromise if he thought it in the interest of Kaiser-Frazer. *Masterson* v. *Pergament*, 203 F. 2d 315. The Supreme Court denied certiorari.

Accordingly the settlement has been finally approved. There is yet to be determined, however, the effect of such approval. This presents a question of first impression in the Federal courts under Rule 23(e).

Questions Here Presented

It is clear that there is here no defense of res judicata to the suit at bar on its merits. This is because nothing has been adjudicated on the merits. All that the District Judge has decided is that he considers a certain settlement in the interest of Kaiser-Frazer; all that the Court of Appeals for the Sixth Circuit has decided, by two to one majority, is that the District Judge did not abuse his discretion in so deciding.

Furthermore plaintiff herein is not precluded from trying his case on the merits by the second branch of the rule of res judicata (sometimes referred to as "collateral estoppel"), which is that even as to a different cause of action from that tried in the first court, an issue once litigated and determined between adversaries cannot be relitigated in the second court. *Cromwell* v. *Sac County*, 94 U. S. 351, 353.

In the Detroit proceedings evidence was taken as to two questions here pertinent; one, whether the instant action had probable merit, and two, whether the settlement was fraudulently procured. The District Judge decided that the instant action was "absolutely without merit;" but the Court of Appeals held the action to be meritorious. 203 F. 2d at p. 335. Hence, if the doctrine of collateral estoppel applies, the estoppel is in favor of the plaintiff herein. As regards fraud, the District Judge failed to make findings, because, as the record clearly shows, he considered the issue to be immaterial. On appeal, Judge Allen found that there was constructive fraud in the settlement; and the other two judges either agreed that fraud was present but held it immaterial, or they simply held the issue of fraud to be immaterial, so did not have to agree or disagree with Judge Allen. Under neither reading of the Court of Appeals' opinion was the issue of fraud determined against plaintiff.

If there is doubt or dispute as to what was decided in the Detroit proceeding, the rule is well settled, *first*, that this Court will look to the record to see what was there decided; *second*, that the burden is on the defendants to prove that the issue was in fact decided in their favor, as claimed by them, and any ambiguity will be resolved against them. The record facts in this regard are hereinafter set out.

However, it may be that this issue will never be reached, since it is of the essence of res judicata that the ruling relied upon must have been made by a judicial body acting in a judicial proceeding and making its determination in a judicial capacity. This, as I shall show, did not occur here. The District Judge ruled that the proceedings were not a trial. He held that his task was solely to determine what was in the best interests of the corporation. He was asked to decide, and did decide this matter in an

exercise of business judgment; and the Court of Appeals affirmed his action in so doing. This was an administrative, not a judicial, determination.

I turn now to the facts appearing in the record of the Detroit proceedings, which show the foregoing.

Fraud in the Settlement Negotiations

The pertinent facts on this issue are set out in the dissenting opinion of Judge Allen. 203 F. 2d at pp. 319-324. This opinion, as the majority stated, "was originally prepared by her for the Court but . . . must now be classified as a dissent" (p. 329). The majority did not disagree as to the facts set forth by Judge Allen, or with her conclusion that such facts constituted fraud; but they held that fraud in the negotiations was immaterial for the reasons mentioned *supra*, p. 5. Judge Allen wrote:

> "Early in 1949, then stockholders' derivative suits were pending against the directors of Kaiser-Frazer in three state courts and in three federal courts. The states included Michigan, California, New York and Delaware.
>
> In April, 1949, Kaiser-Frazer was in default upon bank loans of $16,000,000 guaranteed by the Kaiser interests, and faced the threat of liquidation. It secured an offer from the RFC in October, 1949, for a loan of $44,000,000. The granting of this loan was conditioned, among other things, upon the making of a guaranty of $15,000,000 of the loan by Kaiser and his associates and a pledge of $10,000,000 of collateral. Henry J. Kaiser stated that he or his companies would not guarantee the loans unless the stockholders' suits were settled, but, as a matter of fact, on November 9, 1949, the day the

order to show cause why the compromise should not be approved was filed; the loans were guaranteed by Kaiser and his associates in a contract which made no mention of the stockholders' suits.

About September 21, 1949, Mark F. Hughes, an attorney connected with the firm which was counsel for Kaiser-Frazer and the Kaisers individually, stated to Samuel L. Chess, attorney for Pergament and London, that there was a possibility of an offer of settlement. After asking for and receiving assurance that Chess had nothing whatever to do with Otis & Company, Hughes said that he might soon have a proposal. Hughes required, and Chess agreed, that Chess would disclose to no one, not even to his own partners or associates, that there was a possibility or any talk of settlement. Chess associated an attorney, Israel B. Perlman, with him, who said that he "couldn't evaluate or appraise the various causes of action," but agreed to help Chess in negotiations. Hughes dissuaded Chess from taking depositions, saying that he would give Chess any information that he would like to have. Later Hughes and his partner, Walston S. Brown, met with Chess. Brown explained some of the facts of the Graham-Paige transaction to Chess, and they also discussed the Fleetwings controversy and the matter of the lease of the Long Beach plant. Brown, in addition to being a member of the firm representing Kaiser-Frazer and being himself a defendant director of Kaiser-Frazer, was also attorney for Henry J. Kaiser, Edgar Kaiser, and Joseph Frazer. At the proceedings in the District Court he testified that in these negotiations with Chess and Perlman his effort was to get the easiest possible terms of settlement for the indi-

vidual defendants and Graham-Paige, and that [redacted] therefore avoided making disclosures or stating facts or furnishing information that would support a recovery for Kaiser-Frazer in these suits. This striking admission was made although Brown's firm was paid by Kaiser-Frazer for these negotiations.

Settlement of the Pergament and London suit was finally proposed. The consideration offered was (1) the guaranty by the Kaiser interests of the RFC loan; (2) the purchase by Kaiser Fleetwings (Kaiser Metal Products, Inc.) at their depreciated book value of certain presses which belonged to Kaiser-Frazer and were in the Fleetwings plant; and (3) $50,000. Chess and Perlman were pleased with the offer. They thought that if they got only the guaranty of the RFC loan it would be a "wonderful settlement." They decided to ask for $500,000, but agreed if need be they would accept the offer as given, rather than jeopardize the compromise. On October 25, 1949, the settlement was executed as proposed, except that it substituted the $500,000 demanded by Chess and Perlman for the $50,000 offered. Three days previous, October 22, 1949, Chess, securing from Hughes the necessary data, filed an amended petition which included the various other causes of action pending in other jurisdictions. The settlement contract contained broad general releases in favor of all the defendants including Graham-Paige, Frazer and Fleetwings, which contributed nothing. The directors of Kaiser-Frazer, all of whom were originally joined as individual defendants, approved the compromise. The proceedings were then brought before the District Court for hearing pursuant to notice under Rule 23(c), Federal Rules of Civil Procedure. So far as this record shows, no discussion was held in

the negotiations as to the value of the added causes of action and the figure of settlement remained the same as that negotiated for the causes of action originally pleaded."

. . . . . .

"The issue of concealment is material. Certain facts were, as Hughes admitted, suppressed during the period of negotiation. Thus it does not appear that Chess and Perlman were informed by Hughes or Brown of the details of the claim for over a million dollars held meritorious by the District Court for excessive prices paid to Fleetwings [a Kaiser controlled company] for doors. Perlman was not informed of the prior negotiations with reference to the purchase of the presses by Fleetwings. He learned of them for the first time in court. The issue of concealment is also material because the attorneys for Pergament and London were forced to conceal from all other attorneys and from their own associates the fact that there was any possibility of settlement."

. . . . . .

"The proceedings for settlement were not only instituted but admittedly directed by the attorneys for the defendants. Depositions were discouraged. Chess and Perlman were briefed by Brown and Hughes whose firm was paid by Kaiser-Frazer but admittedly acted adversely to it. In the negotiations Perlman, who had charge of the bargaining, refused to discuss the merits of the causes of action pleaded in the Pergament amended complaint. He frankly said he could not evaluate them. Brown said that he had no knowledge of his own about the Permanente transaction. Perlman's office associates were acquainted with the claims but Per-

man was forbidden to discuss them. The only question debated in the conference was the amount of cash settlement."

* * * *

"Pergament and London were under a duty fairly to represent the common rights of other stockholders. *Young* v. *Higbee Company*, *supra*, 212. They did not, under the undisputed facts, represent them at all as to Fleetwings or the Muntz Car Company case. Up to a few days before the actual settlement, the Fleetwings transactions were considered of no importance by Chess. They were not included in the amended petition of September 13, 1948, upon which the negotiations were founded and the amount of the settlement was in no way increased when they were included in the final amendment. The Muntz Car Company transaction, evidence as to which has been deleted from the record, was found by the court to have probable merit in the amount of $85,000, and was also completely ignored. These meritorious causes of action, under the admitted evidence, have no weight in the result achieved for Kaiser-Frazer.

The releases included in the proposed settlement emphasize the lack of effective representation by Chess and Perlman. The general releases covered three non-contributing defendants, Graham-Paige, Fleetwings, and Joseph Frazer. These were the defendants primarily liable if the District Court's conclusion that the Fleetwings door transaction, the Graham-Paige receipt of underwritten stock from Kaiser-Frazer, and the Muntz Car Company distributorship matter presented cases of merit. The order of the District Court limited the general release provisions of the settlement in certain ways but left them in force as to these causes

of action. These releases were of course desirable for the defendants but hardly beneficial to Kaiser-Frazer and other stockholders. Brown, as chief negotiator for the settlement on behalf of the defendants, director and secretary of Kaiser-Frazer, and admittedly acting in dual capacities, was released on motion of the plaintiffs prior to the hearing.

It is conceded that the settlement agreement was planned and negotiated by the attorneys for the defendants Henry J. Kaiser, Joseph Frazer, and individual directors, who, while nominally representing Kaiser-Frazer, admitted that they were acting adversely to its interests. These attorneys picked the suit that they would settle, with its friendly lawyers, and by amendment inserted in the suit causes already pending in three federal courts in other states and in three state courts. The adversary relationship essential to protection for Kaiser-Frazer was thus seriously impaired if not destroyed."

* * * * *

"But the question of notice and acquiesence in representation by Pergament and London is even more important. While the members of the class had constructive notice of the pendency of the amended complaint of September 13, 1948, they had no effective notice of the amendment of October 22, 1949, which appropriated all other causes of action. Three days intervened between this final amendment and the execution of the compromise. Appellees' witnesses frankly state that the compromise negotiations were carefully concealed because the appellee knew that other parties in similar suits would "make as much trouble for us as they possibly could." The inescapable infer-

ence is that appellee knew that their representation would not secure assent. Notice was given to all parties before hearing in the District Court upon the compromise but notice was carefully withheld from parties other than the negotiators until the compromise agreement was executed.

If manipulations such as these are upheld in the courts, the stockholders' derivative suit, which was developed to protect the corporation and its stockholders from breach of trust or fraud on the part of the directors, will cease to be a protective shield. The deliberate concealment and exclusion of other parties and appropriate of their causes of action run counter to the purpose of Rule 23(a) and constitute constructive fraud upon the stockholders of Kaiser-Frazer."

* * * *

"I think the settlement should be set aside because of unfairness in the negotiations."

The majority, in so many words, refused to be led into a discussion of these facts, on the ground that, in a settlement proceeding under Rule 23(c), the District Judge sits as "a third party to the compromise," and there being no fraud *upon him*, antecedent fraud practiced on the other parties in negotiating the settlement did not matter. Under law universally recognized, fraud in the factum of a settlement between fiduciary and cestui vitiates the settlement; and a determination to approve a settlement so obtained in disregard of the fraud, is an administrative decision on a point of business judgment and not a judicial determination.

The further facts, to which I now turn, show that the defendants brought on, and the District Judge conducted, the proceedings as administrative and not judicial proceedings.

Affidavit of Lewis M. Dabney, Jr.

THE DETROIT PROCEEDINGS

1. The Manner in Which the Defendants Brought on and Conducted the Detroit Proceedings Shows that They Did Not Consider Them to be Judicial Proceedings.

The Pergament complaint as amended on September 13, 1948 set forth three claims for relief, the second of which was based upon the transaction set forth in the complaint herein. Jurisdiction rested solely on diversity of citizenship. The individual defendants in the second cause of action were nine of the ten directors of Kaiser-Frazer who are individual defendants herein. The omitted defendant was Edgar Kaiser (Ex. 1 to moving affidavit, p. 19) who was named, however, as a defendant in the first and third causes of action. The original complaint named Walkton S. Brown as a defendant; however, when the amended complaint was filed on September 13, 1948, Brown, whose citizenship was alleged to be the same as that of the plaintiff, Pergament, was dropped. Hence, Brown and Edgar Kaiser were, so far as concerns the instant case, not parties to the suit which was chosen as the vehicle of settlement; and Brown *could not* be a party, as that would have destroyed diversity.

At the time of the petition for settlement Kaiser-Frazer had appeared and answered, and so had the following defendants: Edgar Kaiser, Bedford, MacDonald and Price. The appearance of Edgar Kaiser, of course, brought him into court only as to the two causes of action in which he was named as a party defendant, but not as to the cause of action pleaded in the case at bar. The remaining individual defendants, i. e., Henry Kaiser, Frazer, Sherwood, Trefethen, and Motter had not been served and had not appeared (Ex. 1 to moving affidavit, pp. 4, 5).

While the agreement for settlement was signed by certain individual defendants, viz., Henry Kaiser, Edgar

Kaiser, Frazer, Bedford, MacDonald and Price (id., at p. 13), none of these defendants joined in the petition for settlement, the petitioning parties being only the settling stockholders and Kaiser-Frazer (id., at p. 6). Although certain of these individual defendants were physically in court as witnesses, they never appeared in the District Court *as parties*. This was recognized in the final order, which does not recite the appearances of the individual defendants, and in the notice of entry of this order, which is signed only, as was the petition for settlement, by counsel for the settling stockholders and for Kaiser-Frazer (291, 290—these and future page references, unless otherwise explained, are to the printed record of the Detroit proceedings).

We will hereafter argue that the individual defendants who were never parties to, or appeared in the Pergament action or settlement proceedings in the District Court, *cannot claim the benefits of the doctrine of res judicata*. This is hornbook law. The point here made is different: The experienced counsel who conceived and conducted the settlement and the Detroit proceedings must have known that no binding judicial determination could be obtained in favor of their clients, Henry Kaiser and his associates, unless they put them in court. Kaiser, who was a citizen of California, could not be brought into court in Michigan in a suit based solely on diversity unless he agreed to come, and other defendants were also non-residents. However, if these defendants came in, they would be in for all purposes, and if the settlement were disapproved and the suit thereafter prosecuted, they might be subject to a judgment on the merits. Counsel thought they found an escape from this dilemma by contriving a tertium quid. They left Kaiser and the other non-resident defendants out of court, but procured releases for them nevertheless, obviously on the theory that since the proceeding was not judicial, these defendants did not have to be in court.

These defendants thus secured releases but left open for future determination the binding effect of the releases in other suits.

2. Defendants Repeatedly Urged the District Judge to Conduct the Inquiry in a Way Inconsistent with Judicial Standards but Consistent with Administrative Procedures; and the District Judge Adopted Their Views.

A.

The cross-examination which elicited the facts as to fraud, summarized in Judge Allen's opinion, supra, proceeded under great difficulties. The proponents of the settlement urged, and the Court held, that the sole issue before him was whether the settlement presented to him was in the interest of Kaiser-Frazer; that it did not matter how the settlement was arrived at, the important thing being that it was now before him; and, specifically, that whether or not the settlement was fraudulently negotiated was neither here nor there. Accordingly, throughout the questioning of Brown, Hughes and Chess the Court made it emphatically clear that he considered it immaterial what Chess and Perlman did not know and were not told. Objections to questioning along these lines were repeatedly sustained (3819, 3835, 3845-9, 3863, 3910, 3953, 3956 and 3963-5). The objection, when first made, was on the ground that "the question here is as to whether this settlement that the Court has to take the responsibility for is a good settlement or not" (3819); and the Court accepted this point of view. Indeed, the Court manifested increasing irritation at the continued pressing of such questions, saying, "What difference does it make" [what was not disclosed] (3835)? He was told that the object

was "to show that the only persons who were acting on behalf of the stockholders were persons who unhappily were without adequate information to enable them to negotiate adequately or effectively" (3846), whereupon, after some colloquy, the following occurred:

> "Mr. Rein: I just want to say this, we knew enough to bring it to your Honor so that everything could be aired.
>
> Mr. Bernays: We will see whether everything was aired after we get the proof in.
>
> The Court: *I am not going to let you go into that*" (3849).

When counsel continued to press his questions the Court said, "You have some objective in these questions? . . . You are not just going on a witch hunt of some kind?" (3853).

Thereafter Mr. Chess was questioned respecting his knowledge of facts obviously relevant to the instant action, i. e., facts relating to market manipulations in preparation for the Kaiser-Frazer stock offering. The following occurred (3955-6):

> "Q. (By Mr. Bernays): Were you familiar with the circumstance that statements were issued and circulated by and on behalf of Kaiser-Frazer, some true, but some stated to have been incorrectly reported, *the intent and effect of which was to raise the market price of Kaiser-Frazer stock* between January 26, 1948 and February 2, 1948, from 11¾, according to Exhibit 166, on the first of those dates, to 14 on the 28th, and the 29th, and to 13½ on February 2, those being the last sale prices?
>
> The Court: Now, I want you to read that last question in part. I just want you to read it, and then I would like to have you look me straight in

the face and tell me that you think that is a proper question.

Read the first part.

(The last question was thereupon repeated in part by the reporter.)

The Court: Is there a gentleman sitting at that bar, including yourself, who thinks that is a proper question?—No.

Mr. Bernays: If I were asking——

Mr. Schofield: We don't say no. I think it is a perfectly proper question.

The Court: All right. Ruled out. Denied.

Now, gentlemen, if that is the line of your questioning, I am going to try one more. You may proceed with some questioning, but if that is the kind of questions you got, you might as well stop right now.

Mr. Bernays: I am bound to say that that is the kind of questions I have.

The Court: If that is the kind of questions, gentlemen, you can't believe that those are proper questions. You just can't believe it.

Mr. Schofield: There are things we knew in our case, and we were ready to prove them.

* * * * *

The Court: *Please. No more time of this Court with such foolishness.*"

Convinced, as the Court was, that he had the power to approve the settlement notwithstanding fraud, his irritation was natural enough. However, it graphically illustrates what *his* premise was: that he was conducting an *administrative* proceeding in which the sole question presented was whether *he thought the settlement was a good one*; not a judicial proceeding in which, if he found

fraud in the negotiations, he would be precluded from approving the settlement.

Defendants successfully pressed this view upon the Court. Throughout the trial they urged upon him that fraud in the negotiations was irrelevant, that any kind of bargaining was good enough so long as it got the proposal before the Court, whose duty it was to "back stop" for the settling attorneys, and to approve the compromise, with such modifications as might be necessary in light of disclosures at the trial, if in his opinion it was in the interest of the company. This is illustrated by the following statement of Mr. Rein, of counsel to Pergament (3566):

> "All this information they are talking about; all the evidence that they are talking about was brought before your Honor, how? By our petition to approve the settlement, opening up——"

It is further illustrated by his statement when challenged as to the lack of information as to pertinent facts, during the negotiations, of his colleagues, Chess and Perlman (3849):

> "Mr. Rein: I just want to say this, we knew enough to bring it to your Honor so that everything could be aired.
>
> Mr. Bernays: We will see whether everything was aired after we get the proof in.
>
> The Court: I am not going to let you go into that."

The proponents' view that the proceeding was non-judicial, is reiterated in the opening argument in their brief to the District Court, following completion of the hearing (p. 2):

> "This is an equity *inquiry* in which the Court exercises its discretionary powers and no jurisdic-

tional problem being presented, *neither thin technicalities nor other legalistic calisthenics should be permitted to influence the sound business judgment of the Court.*" (Emphasis ours.)

The "thin technicalities" and "other legalistic calisthenics" referred to, was the issue as to fraud in the negotiations.

The Court, as shown by his opinion (93 F. Supp. 13), adopted and followed the proponents' views expressed above. Referring to the extended arguments of counsel that preceded the taking of proof, he said in his opinion (p. 19) that "This Court was interested only in the stockholders of Kaiser-Frazer and in our opinion these several lawsuits were a big detriment to future progress of this company. Technicalities were not to be permitted to erase or delay a fair settlement if one had been reached." The following observations will make clear what was intended by the foregoing:

(1) The Court's interest in the stockholders, with which, of course, we have no quarrel, was expressed by him during the arguments referred to in the following terms (1746): "I am trying to save this company, as I told you right from the start. *That is my duty. . . .*" (Emphasis ours.)

In other words, the Court consistently envisaged his function as that of the executive, interested only in the business merits of the proposal before him and wholly indifferent to how that proposal had come about. On this score the Court was under a sense of compelling urgency, as appears from the following (579):

> "The Court: . . . I think lawsuits like this do a tremendous harm to a corporation. I think time is of the essence, so far as the existence of the corporation is concerned, the possible existence. And

successfulness, whether the company is successful, will hang in abeyance for the time being.

Mr. Schofield: No.

The Court: Yes."

(2) Accordingly, "technicalities," such as fraud in the antecedent negotiations, would not be "permitted to erase or delay a fair settlement if one had been reached," the test being the objective one whether in the Court's opinion the settlement was a good one as a business matter. This ignores, of course, the prime practical reason (apart from considerations of public policy) for the rule that vitiates a settlement procured by a fiduciary through fraud, namely, that the cestui is entitled to a fair chance to work out the best possible settlement, whereas a settlement procured by the wrongdoing fiduciary through non-disclosures and fraud can never be expected to be as favorable to the cestui as one honestly arrived at by effective and informed arms length bargaining.

(3) This, I submit, is the rationale for the distinction which the Court drew (93 F. Supp. at p. 21) between his function in the case of an "executed" settlement and his function in the case of an "executory" settlement. In the first case the Court would be sitting in its *judicial* capacity and determining the issues before it on established legal and equitable principles; hence if there was fraud in the factum the settlement *must be disapproved because the law compels it.* In the case of the "executory" settlement, however, where the Court, in the language later used by the Court of Appeals, acts as a "third party to the compromise," the Court is not acting in his judicial capacity but in the *executive* or *administrative* capacity of business arbiter, deciding what is in the business interest of the company. This, too, is disclosed in the Court's opinion

in the statement (p. 20; emphasis ours): "The important point is that this court—while not admitting that there was any such concealment—*now has the facts*," following which (p. 21) occurs the distinction between "executed" and "executory" settlement to which we have adverted above. This position conforms perfectly with the numerous rulings and statements of the Court on the issue of fraud during the hearings as quoted earlier herein.

B.

The District Court Refused to Permit Plaintiffs to Examine Before Trial on the Theory that He Was Not Conducting a Trial.

The Court repeatedly denied to objecting stockholders, including this plaintiff, their right to examine before trial for the purpose of showing that the settlement had been improperly and unfairly negotiated.

Notice of the hearing on the settlement was issued November 9, 1949, setting December 6th as the date of the hearing. Through one of my associates I requested counsel for the settling stockholders and for Kaiser-Frazer to inform objecting stockholders respecting the negotiations which had led to the proposed settlement. This request was refused. Thereupon notices were issued, in the Detroit proceeding, to take the depositions of the attorneys who had negotiated the settlement, and subpoenas duces tecum were issued out of this Court requiring the appearance and production of records by said attorneys bearing on such negotiations on November 23, 1949 in New York City. Thereupon counsel for the settling stockholders and Kaiser-Frazer secured an ex parte order from the Detroit Court staying the taking of these depositions until December 6, 1949, which was the date

set by the Court for the commencement of hearing on the proposed settlement.

Since this stay effectually deprived objecting stockholders of their right to examine before trial, counsel on November 23rd moved to vacate the stay, or, in the alternative, to postpone the hearing date. In the motion papers they pointed out to the Court the obvious lack of arms length bargaining due to the conflicting positions in which Brown and Hughes found themselves, and stated that they desired to examine "as to the history of the negotiations leading up to the proposed settlement" (181, 182). By telephone they asked the Court to set a prompt hearing on their request to vacate the stay, but the Court refused to set such hearing, or to vacate the stay, and stated that all matters could be taken up at the hearing set for December 6th.

The first two weeks of the hearing were devoted to statements of position and argument by counsel, wherein the following occurred (471):

> "The Court: * * * What is the other motion?
>
> Mr. Dabney: The other motion is a motion filed with your Honor about three weeks ago to permit us to proceed with our examinations before trial. At the time we filed the motion, we were not at the trial. But we are now.
>
> The Court: The notices had gone out for trial all over the United States?
>
> Mr. Dabney: That is correct, and we say, and I want to be heard briefly, that under the Federal Rules of Civil Procedure the right to examine before trial, and that is what we are getting into in substance,—*the right to examine before trial is a right that is valuable of which a litigant should not be deprived.*
>
> The Court: *I do not think this is actually a trial within the meaning of that rule.* * * *"

Thereafter, on or about December 17, the Court adjourned the hearings until January 17, 1950. He ruled that he would permit the taking of depositions of all persons *who would not be present at the hearing* (611). Since the attorneys who negotiated the settlement would necessarily be present, objecting stockholders were again precluded by this ruling from examining them before trial respecting the settlement and the settlement negotiations. The following then occurred (612):

> "Mr. Dabney: All I want, your Honor—I am not talking about the motion, I am talking about the depositions—I can see no reason why we should not be allowed to take depositions in the meantime; it will not delay the Court, because the Court is not going to sit until the 17th. Why should we be deprived of examing anybody we can examine in the meantime?
>
> The Court: I am not going to be caught in that possible trap. If you do it, Mr. Lacks may want to do it, or all of you may want to do it. And you will say, 'You did it for him, and now you are going to do it for me.' I have made my ruling, gentlemen."

Of course, it would obviously be improper in a *judicial* proceeding to deprive plaintiffs of their right, seasonably asserted, to examine before trial on the ground that others later asserting the same right might also be entitled to examine before trial. Naturally the Court knew this, and the reason for his ruling was the one previously stated, *"I do not think this is actually a trial within the meaning of that rule."*

The Federal Rules of Civil Procedure, including those relating to examination before trial, apply to "all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81" (Rule 1,

F. R. C. P.). None of the specific exceptions in Rule 81 apply to proceedings under Rule 23(c). Accordingly, the Court must have thought that a proceeding under Rule 23(c) is not "a case of a civil nature", i. e., a *judicial* proceeding.

C.

The District Court Admitted in Evidence, and Permitted Himself to be Influenced by Considerations Inappropriate in a Judicial Proceeding. Thus Further Evidencing His View That the Proceeding Was Not Judicial.

The hearings in Detroit proceeded against a background of charges and countercharges in the public press between Henry Kaiser, the dominant figure in Kaiser-Frazer, and Cyrus Eaton, the dominant figure in Otis & Company. This controversy arose in connection with the manipulative stabilization of the stock of Kaiser-Frazer in preparation for the offering of its shares, which is the subject matter of the instant action. The relevant facts as to this controversy are stated by Judge Allen as follows (203 F. 2d at pp. 318-9):

> "• • • The manipulation and stabilization transaction [arose] out of claimed violations in 1948 by Kaiser-Frazer of Sec. 9(a) (2) of the Securities Exchange Act of 1934. Kaiser-Frazer had agreed with three underwriters to offer an issue of 1,500,000 shares of stock for sale to the public at the close of the market on February 3, 1948. It was arranged that Kaiser-Frazer should stabilize the stock by purchase until the close of the New York Curb, and it was estimated that Kaiser-Frazer, in

order to stabilize, should purchase not more than 25,000 shares. These arrangements miscarried and, as a result Kaiser-Frazer purchased 186,200 shares of its own stock at a price of $13.50 per share. Later Otis & Company and the First California Company, two of the underwriters, notified the corporation that they would not handle the stock and so the stock sale was completely abortive. Out of this transaction hostility and litigation arose between Kaiser-Frazer and Otis & Company. A suit was filed by Kaiser-Frazer in New York for damages for breach of contract by Otis & Company due to its failure to accept and pay for the stock which it had contracted to underwrite was successful in the United States District Court. But the Court of Appeals for the Second Circuit reversed the judgment below and directed entry of judgment for defendants upon the ground that Kaiser-Frazer in this transaction misrepresented certain items of profit in the prospectus and registration statement and that Otis & Company was thus released from liability. *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d 838. Certiorari denied, 344 U. S. 856.

The Court of Appeals for the Second Circuit declared in that case, pages 843, 844: 'Kaiser-Frazer stated its earnings in such a way as to represent that it had made a profit of about $4,000,000 in December 1947. This representation was $3,100,000 short of the truth . . . Any sale to the public by means of the prospectus involved here would have been a violation of the Securities Act of 1933, 15 U. S. C. A. 77l (2).'"

The litigation referred to by Judge Allen was pending and undecided during the Detroit proceedings. Throughout these proceedings proponents of the settlement re-

peatedly charged that the various stockholder actions, including the instant action, were inspired by Eaton in furtherance of his feud with Henry Kaiser. Of course, this unfounded alleged motivation of the stockholders' actions is immaterial upon a trial of such actions on their merits. *Young* v. *Higbee Corp.*, 324 U. S. 204, 212. Nevertheless, the Court, upon this irrelevant issue, admitted hundreds of pages of testimony taken in another proceeding, and plainly incompetent in a judicial proceeding. This occurred as follows:

As purported proof of the assertion that Eaton had inspired the Masterson suit, the proponents offered en masse the testimony of twenty (20) witnesses, covering some two thousand (2,000) pages, which was taken in an ex parte investigation conducted by the Securities and Exchange Commission. The plaintiff in the case at bar, and others of the objecting stockholders, did not participate in the SEC hearings in any fashion. Otis and Masterson, and their respective counsel, were present at certain of the hearings, but were not permitted to cross-examine on the ground that the SEC was not conducting a trial but an investigation. The proferred testimony was objected to as incompetent. After several days' consideration the Court admitted the testimony for the following reasons, among others (3996-7):

> "The Court: This may go on the record. The Court holds that the SEC testimony is relevant for any or all of the following reasons:
>
> First, the approval or non-approval of the offer of settlement is a matter within the discretion of this Court.
>
> Second, in arriving at its conclusion, the Court is not bound by the strict rules of evidence;
>
> Third, it being a matter of discretion, the motive of those either opposing or proposing the settle-

ment may be considered by the Court in arriving at that conclusion;

* * * *

"Fifth, while the motive of one bringing a suit (even to the extent of changing one's residence in order to acquire jurisdiction), may not be inquired into, and while equity follows the law, and legal rights of an individual are the same regardless of what prompted the suit. The courts apparently draw a distinction, and rightly so in this Court's opinion, where the matter is not one of legal right but of discretion, and although motive in such an instance might or might not be controlling, it may be considered by the Court as affecting, among other things, credibility, sincerity, and whether the proposed settlement would be for the benefit of the company and for the best interests of the stockholders therein" (3996-3997).

The final reason, supra, for admitting evidence concededly not admissible in a judicial proceeding was more vigorously phrased during the preliminary discussion before the taking of evidence (579; some of what follows has been quoted earlier in a different context):

"The Court: * * * I think lawsuits like this do a tremendous harm to a corporation. I think time is of the essence, so far as the existence of the corporation is concerned, the possible existence. And successfulness, whether the company is successful, will hang in abeyance for the time being.

Mr. Schofield: No.

The Court: Yes.

Mr. Schofield: Not on these lawsuits, surely.

The Court: If I become convinced that *these*

suits were started from an ulterior motive, I will end this mighty quick." (Emphasis ours.)

Obviously, a judicial proceeding could not be "ended mighty quick" because the Court became convinced of the irrelevant circumstance, even assuming it to be true, that the proceeding was started "from an ulterior motive." In fairness to the Court, this can only be explained upon the basis that he was firmly convinced that he was not conducting a judicial but an administrative proceeding.

3. On Appeal Proponents Argued to the Court of Appeals that the Detroit Proceeding Was Not a "Trial" but a "Discretionary Proceeding" Where the Court, Exercising "Administrative" Rather Than "Judicial" Function, Must Exercise "Business Judgment". This Argument Prevailed and the Majority of the Court of Appeals so Held in Substance.

On appeal plaintiff and the other objecting stockholders relied for reversal principally on three points: (1) fraud in the negotiations; (2) erroneous appraisal of the merits of, and probable recoveries in, the stockholders' claims; and (3) disproportion between the value of the stockholders' claims, as against the consideration offered in settlement.

The opposing arguments were, in summary: (1) that fraud is immaterial, the reasoning being that the Court sits in an administrative capacity, and his duty is to exercise business judgment, and to decide whether the settlement is in the interests of the company; and (2) the Court's appraisal, that the benefit to Kaiser-Frazer of the considerations offered in settlement exceed the value of the claims surrendered, is so much a matter of business

judgment as to leave an ample margin for any errors which the Court made in underestimating the merits of the respective causes of action.

Thus, the brief on appeal of the individual defendants contains the following statements and arguments: The proceeding below was not a "trial" but a "discretionary proceeding" (51), in which a wide variety of factors could be considered, including factors such as "the harm which the continuance of the litigation may do to the reputation of the corporation" (33). It was not the function of the District Court "to try the merits involved in each cause of action" (33). "In view of the complex questions which the District Court has to decide, the situation is one, as in the case with every approval of the compromise of litigation, where the Court must exercise *business judgment*" (33-34; emphasis supplied). And defendants quoted from the decision of the Court of Appeals for the Sixth Circuit in *Reconstruction Finance Corp.* v. *Kentucky River Coal Corp.*, 114 F. 2d at p. 942, the following expression:

> "A court's decision on a matter of business policy is *administrative* in nature rather than *judicial* and cannot be disturbed on review unless there was an abuse of discretion." (Emphasis ours.)

So far did defendants go in this argument, that in their reply brief they said (p. 5): "In fact, the existence of an agreement is not even a necessary condition precedent to an application for approval of a settlement under Rule 23(c)." In other words, a 23(c) proceeding, on defendants' theory, does not involve a suit "of a civil nature * * * cognizable * * * at law or in equity (Rule 1, F. R. C. P.), but envisages only the situation in which two parties, interested in a possible settlement, work out the terms in conference with the District Judge sitting "as a third party to the compromise."

The Pergament brief was to the same effect but directed with greater particularity to the issue of fraud in negotiations. Its burden was: The settling stockholders merely set in motion the machinery for approval, but power is in the Court, not the stockholders, to compromise (47). The authorities requiring full disclosure as a prerequisite to a valid release from a corporation to its directors, "including the much cited *Irving Trust Co.* v. *Deutsch*, 73 F. 2d 121, involve completed releases. In none of them was application *first* made to the court, as in the case at bar, before the release became effective. In the ordinary trustee-cestui relationship, the ratification is by the cestui. In representative actions, including stockholder derivative suits, *such 'ratification' is by the court.* Appellants make no claim that any material fact was not disclosed *to the Court* before its final approval of the settlement agreement" (p. 52; emphasis ours except as to the word "first").

The majority of the Court of Appeals adopted this argument in the following words (203 F. 2d 329-331; 336; emphasis supplied):

> "It has always been our view, however, that the principle governing responsibility for inequitable or illegal conduct is not to be applied in a vacuum but that those who complain of it must show that they were injured thereby (citing cases). This leads us to the view that the *crucial question* in this derivative suit is whether the settlement arrived at between representatives of the stockholders and the corporate and individual defendants was at the time and under the circumstances in which it was arrived at and considered by the District Judge, *for the best interests of the Kaiser-Frazer Company.*"

* * * * *

Affidavit of Lewis M. Dabney, Jr.

"We are not to be led into a discussion of the many contentions urged upon the court to the effect that the negotiators of the settlement on behalf of the corporation were not fully informed; that material information was concealed from them; that the lawyers participating occupied a dual role; or that there was no arm's length bargaining. The settlement agreement did not, and could not, become effective without the approval of the court under the mandate of Rule 23(e). *The District Judge was, therefore, a third party to the compromise.* There is no contention, and there could be none, that in approving the compromise important information was concealed *from him* or that *his* participation in the settlement was subject to any infirmity. Every possible aspect of opposition was fully by him explored. In any event, he ruled against the objectors upon these matters upon the consideration of substantial evidence and in the exercise of a sound judicial discretion.

. . . . .

". . . we are unable to conclude that the District Judge was clearly erroneous in his major findings, or *abused his discretion* in his ultimate conclusions."

THE GRATUITOUS RELEASE OF THE CLAIM HEREIN ASSERTED.

This claim, as previously stated, was lumped with several other claims, all of which were settled for three items of consideration: (1) $500.00 in cash, all of which was paid by Permanente Metals Corporation in consideration of the release of a claim asserted solely against it, which had nothing to do with the claim in suit; (2) the pur-

chase by Kaiser Fleetwings Co., the defendant in one of the other asserted claims (which the District Court found to have substantial merit) of certain metal presses, the property of Kaiser-Frazer, for their depreciated book value; and (3) the guaranty by certain companies controlled by Henry Kaiser of a loan by RFC to Kaiser-Frazer and one of its subsidiaries.

The undisputed testimony showed that in the settlement negotiations there was *no separate appraisal* of the merits of the claim herein and *no separate consideration* given for the settlement of such claim. The evidence showed that counsel for the settling stockholders thought the claim "was a very weak cause of action" (925). The District Court found that the claim had "absolutely no merit." However, the Court of Appeals held that the claim has merit, and that the damage recoverable is measured by the difference between the price of $13.50 a share which defendants caused Kaiser-Frazer to pay for the 186,200 shares purchased in the abortive stabilization, and the value of these shares at the time of the trial (203 F. 2d, at p. 333). The market value of such shares is now $2.25 per share. Accordingly, the damages now recoverable would be over $2,000,000, and, including interest, would run over $2,600,000.

LEWIS M. DABNEY, JR.

(Sworn to December 21, 1953.)

Reply Affidavit of Lewis M. Dabney, Jr., Read in Opposition to Motion.

(Cert. tr., pp. 152-158.)

[SAME TITLE.]

State of New York,
County of New York—ss.:

LEWIS M. DABNEY, JR., being duly sworn, makes this reply affidavit.

The reply affidavit of Mr. Hughes is wholly directed to showing that the District Court in Detroit found (1) that there was no fraud in the bargaining; and (2) that plaintiff, in various statements and arguments has so recognized. The entire record is before the Court and speaks for itself. Accordingly, I will confine this affidavit to (1) the more important misstatements and omissions in the Hughes affidavit respecting the contents of the record; and (2) Mr. Hughes' references to matters outside the printed record on appeal which is now before the Court.

A

Page 4 of the Hughes affidavit states that the District Court found "that there was no 'collusion, fraud, concealment or unfair dealing in arriving at the compromise' and that 'there was arms-length bargaining.'" What the Court actually said was (R 242, 93 F. Supp. at p. 21):

> "But here *we do not* find any collusion, fraud, concealment or unfair dealing in agriving at the compromise and *we hold* there was 'arms-length bargaining.'" (Emphasis ours.)

It is apparent from the above that the District Court failed to make findings on the issues of "collusion, fraud, concealment or unfair dealing," which is emphasized by the fact that he, immediately thereafter, affirmatively found that there was "arms-length bargaining." In a reply memorandum we will show that this failure to find on the part of the District Court, was not inadvertent but was consistent with his rulings, throughout the trial, that the issues of concealment and unfair dealing and of fraud and collusion (in the sense of constructive fraud) were immaterial.

Mr. Hughes, when he made his affidavit, was well aware of our contention that the words above quoted from Judge Picard's opinion amount not to a finding that there was no constructive fraud and concealment or misleading, but to a failure to find on the subject. This contention was previously made before the Court of Appeals, and, as our memorandum will show, the Court of Appeals accepted it. That Mr. Hughes is not altogether satisfied with Judge Picard's language is shown by his failure to quote it accurately and in full.

B

Mr. Hughes (p. 5 Reply Affidavit) quotes a statement which I made in argument before Judge Picard that the necessary effect of a settlement in the Detroit proceedings would be to destroy the Stella action. This statement was made before the taking of testimony had begun and was based upon two assumptions under which I was laboring at the time but which turned out to be erroneous, viz. that the proceedings were to be conducted as judicial proceedings, and that the settlement would not be approved if fraudulently arrived at.

Subsequently, before the Court of Appeals, I am al-

leged to have made the statement that "the settlement approved below will forever release the defendants from their wrongdoings." I do not have a copy of my arghment before the Court of Appeals and am unwilling to accept Mr. Hughes' statement as complete or accurate. Assuming that I made this statement, I was evidently still laboring under the erroneous impression that the proceedings were judicial and that the settlement would not be approved if found to be fraudulently negotiated. It was only after the Court of Appeals determined that the District Judge sat not in his ordinary capacity as a judge determining controversies, but as a "third party to the compromise" who could disregard fraud in the settlement if he considered the settlement nevertheless in the interests of the Company, that I concluded that the Detroit proceedings were not and could not be res judicata. If there is any legal doctrine other than res judicata whereby the Detroit proceedings could "destroy" an action pending before this Court, Mr. Hughes has yet to indicate what that doctrine is.

C

The statement quoted by Mr. Hughes from our original application for fees filed in the District Court in Detroit was similarly made before the true nature of the proceedings had been revealed by the majority decision of the Court of Appeals. The original petition for fees was filed even before the appeal was perfected and over our objection that all fee proceedings should be postponed to await the determination of the appeal. On pages 3 and 4 of such application the following appears:

> "Petitioners, on behalf of their respective clients, opposed the settlement, have appealed from the order approving it, and have sought to have the

filing of applications for compensation and reimbursement of expenses deferred until after the determination of the said appeal. However, the petitioners were overruled. They are constrained, therefore, to make their application at this time, and to predicate it upon the assumption that the Court's determination as to the merits of the settlement and its value to K-F is correct in all respects and will be affirmed.

In so proceeding, the petitioners do not waive their objections to the settlement. They intend to press such objections on the appeal herein, and they expressly reserve the right to do so."

The quotation from our supplemental application which was filed after the Supreme Court had refused certiorari is incomplete and misleading. The language of the application was that of one of my associates, representing another stockholder, who prepared and signed the application and was authorized to sign in my behalf. The following statement in that application is omitted by Mr. Hughes:

"It appeared from careful study of the majority opinion that the Court felt, as this Court had, that the judicial review and the full disclosures made at hearing were sufficient to satisfy the requirements of Rule 23c of the Federal Rules of Civil Procedure, even assuming arguendo that there was no arm's-length bargaining."

D

The order approving the compromise to which Mr. Hughes refers was prepared not by the Court, but by Mr. Hughes and/or his associates. Obviously, the recital

in the order goes beyond the opinion. The order is in its own proceeding of course effective according to its terms; but for purposes of res judicata it will not prevent this Court from examining the entire record to see what was litigated and determined therein. *Oklahoma* v. *Texas*, 256 U. S. 70, 86.

E

Since defendants admittedly do not rely on res judicata, and since this Court is accordingly not bound to follow Judge Picard in approving the Detroit agreement of settlement, this Court must, if it does not try the case on the merits, independently examine the advisability of the settlement. In such examination the Court must consider the situation as it now is, and not as it was in 1950 when Judge Picard decided to approve the settlement. It is now apparent that Judge Picard seriously underestimated the merits of the instant case and seriously overestimated the value of the consideration received in settlement.

1. Judge Picard held that the claim presented in the instant action had "absolutely no merit" (93 Fed. Supp. at p. 35). The Court of Appeals subsequently held that it was a valid claim which if litigated would now result in a recovery of over $2,000,000 (plaintiff's answering affidavit, p. 30).

2. The principal reason for Judge Picard's approval of the settlement was that he thought that the guaranty of the RFC loan which was the principal consideration offered in settlement, would give Kaiser-Frazer a "fighting chance" to survive (93 F. Supp. at p. 29). The Court of Appeals, in affirming again stressed the major importance of the fact that the guaranty gave Kaiser-Frazer

a "chance to live" (203 F. (2d) at p. 336). This chance has now greatly decreased and it is now perilously close to zero.

The financial condition of Kaiser-Frazer on June 30, 1953, is discussed in an article in the Wall Street Journal of October 22, 1953, copy of which is hereto annexed as Exhibit A. It appears from the article that Kaiser-Frazer lost over $10,000,000 in the six months ended June 30, 1953. It further appears that it will not disclose its balance sheet nor comment as to the correctness of a balance sheet which the Wall Street Journal has obtained from another source, and which, according to that paper shows that as at June 30, 1953, Kaiser-Frazer had long term debt of over $66,000,000 and current liabilities of over $21,000,000 and that "the total stockholders' investment was represented as a deficit figure of $2,070,109 against an original paid-in capital of $66,797,714."

A report in Standard Statistics under date of December 7, 1953, shows that in the three months ended September 30, 1953, Kaiser-Frazer reported an additional loss of $4,558,703. This reduced its stockholder equity as at that date to a *deficit* of over $6,000,000. Accordingly, at that date Kaiser-Frazer was, per books, insolvent. To demonstrate its solvency in the bankruptcy sense, Kaiser-Frazer would have to show that the fair value of its assets exceeded the book value by over $6,000,000.

It is therefore apparent that Kaiser-Frazer is either now insolvent in the bankruptcy sense, or on the verge of insolvency. According to current press reports, Kaiser-Frazer is shut down and is producing no automobiles. The present year by common consent, will be a hard year in the automobile business in which even the leaders of the industry will have hard sledding.

Of course, the claim herein prosecuted and other claims settled in Detroit do not appear as assets on the books

of Kaiser-Frazer. Excluding any value which these claims may have, Kaiser-Frazer is now, on information and belief, insolvent. Neither the majority nor the minority in the Court of Appeals attempted to put a dollar value on these claims but the reasoning of the majority as applied to the facts in the record would indicate that these claims had a value of between $4,000,000 and $5,806,000; whereas the reasoning of Judge Allen would indicate that these claims had a value of $9,000,000 to $10,000,000. Accordingly, the only chance of the stockholders of Kaiser-Frazer realizing anything from their investment in this Company of over $66,000,000 (see Wall Street Journal article) lies in their being allowed to prosecute these claims.

While these facts have no relevance, if the Detroit proceedings are res judicata they have great relevance if such proceedings are not res judicata; and in the event that this Court agrees with the holding of Vice-Chancellor Seitz in Delaware (which will be discussed in our memorandum) that the proceedings in Detroit are only to be taken into account along with other facts, I submit that the above facts should properly have great weight in determining whether this Court will now ratify the Detroit settlement.

LEWIS M. DABNEY, JR.

(Sworn to January 13, 1954.)

Memorandum Opinion of the District Court.

(Cert. tr., pp. 160-161.)

[SAME TITLE.]

(The Original Opinion is Endorsed on the Moving Papers)

The identical claims asserted in the instant derivative suit brought on behalf of the Kaiser-Frazer Corporation were alleged in *Pergament* v. *Joseph W. Frazer, et al.*, a derivative suit filed by another stockholder of the same corporation. The Pergament suit was settled after proceedings duly had under Rule 23(c) F. R. P. C. upon due notice. The plaintiff herein appeared in these proceedings and objected to the settlement proposed; his objections after full hearing were overruled (98 F. Supp. 9, aff'd 203 F. 2d, 315 (6th Cir. 1953) cert. den. October 12, 1953, Docket No. 133).

The settlement in the Pergament suit released all the defendants named in the instant suit from any and all claims arising out of the matters alleged herein. It was determined that fraud was not present in the accomplishment of the Pergament action, but, in any event, the settlement may not be here collaterally attacked after judicial approval.

Motion granted; complaint dismissed with prejudice, without costs; the Clerk is directed to enter judgment accordingly.

SYLVESTER J. RYAN,
U. S. D. J.

2/11/54

Judgment.

(Cert. tr., p. 163.)

[SAME TITLE.]

The defendants, having moved this Court for an Order granting to the defendants summary judgment and dismissing the complaint herein, and said motion having duly and regularly come on to be heard;

Now, upon reading and filing the Order to Show Cause dated November 24, 1953, the motion to amend said Order to Show Cause dated November 30, 1953, and the Order of Judge Thomas F. Murphy dated November 30, 1953 amending said Order to Show Cause, and the affidavit of Mark F. Hughes verified the 24th day of November, 1953 and the exhibits attached thereto, the affidavit of H. Bartow Farr, Jr. verified the 30th day of November, 1953, the affidavit of Mark F. Hughes verified the 7th day of January, 1954 and the exhibits attached thereto, except for Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19 and the affidavit of Alfred Virdirosa, verified the 2nd day of December, 1953, establishing proof of publication of a notice to the stockholders of the defendant corporation, all in support of said motion, and the affidavit of Lewis M. Dabney, Jr. verified the 4th day of December, 1953, the affidavit of Lewis M. Dabney, Jr. verified the 21st day of December, 1953 and the affidavit of Lewis M. Dabney, Jr. verified the 13th day of January, 1954 and the exhibit attached thereto in opposition to said motion, and after hearing H. Bartow Farr, Jr. and Francis B. Delehanty, Jr. in support of said motion, and Lewis M. Dabney, Jr. in opposition thereto, and the Court having concluded that the defendants are entitled to summary judgment as a matter of law and to dismissal of the complaint with prejudice;

Judgment.

Now, on motion of Willkie Owen Farr Gallagher & Walton and Corbin Bennett & Delehanty, attorneys for the defendants, and upon filing the memorandum opinion of the Court, it is

ORDERED AND ADJUDGED, that the said motion be and the same hereby is granted, that the complaint herein be dismissed with prejudice, but without costs.

Dated: New York, N. Y.
February 19, 1954.

WILLIAM K. CONNELL
Clerk

February , 1954

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No. 202

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

APPENDIX TO BRIEF FOR APPELLEE.

INDEX.

Designation of Portion of Record to be Printed.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Frazer Corporation, appellees herein, hereby designate the following portions of the record as the portions which they think it necessary to print in order fairly to present the question on appeal:

1. The complaint in the above entitled action.

2. The order to show cause dated November 24, 1953 and the affidavit of Mark F. Hughes verified the 24th day of November, 1953 annexed thereto together with Exhibits 1, 2 and 3.

Designation of Portion of Record to be Printed.

3. The affidavit of Alfred Virdirosa, verified the 2nd day of December, 1953 together with a copy of the notice to stockholders referred to therein.

4. The affidavit of Lewis M. Dabney, Jr. verified the 4th day of December, 1953 through line twenty-four on page 4 of said affidavit concluding with the words "two other cases".

5. The affidavit of Mark F. Hughes verified the 7th day of January, 1954 together with Exhibits 20 and 21.

Dated: July 12, 1954.

WILLKIE OWEN FARR GALLAGHER & WALTON

By MARK F. HUGHES
A Member of the Firm.
Attorneys for Defendant, Kaiser-Frazer Corporation.

CORBIN BENNETT & DELEHANTY,

By FRANCIS B. DELEHANTY, JR.
A Member of the Firm.
Attorneys for Defendants, Henry J. Kaiser, *et al.*

Complaint.

[SAME TITLE.]

MICHAEL STELLA, plaintiff herein, brings this action on behalf of himself and all other stockholders of Kaiser-Frazer Corporation similarly situated against Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Fraser Corporation, defendants herein, and alleges:

1. Plaintiff is a resident of the City and State of New York. Defendant Henry J. Kaiser (hereinafter called Kaiser) resides in the City of Oakland, California. Defendant Joseph W. Fraser (hereinafter called Fraser) resides in the City of Willow Run, Michigan. Defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter, and Hickman Price, Jr., all reside in the City of Willow Run, Michigan. Defendants G. G. Sherwood and E. E. Trefethen, Jr., reside in the City of Oakland, California. Defendant Walston S. Brown resides in the City of New York, New York. Defendant Kaiser-Fraser Corporation (hereinafter called Kaiser-Fraser) is a corporation organized and existing under the laws of the State of Nevada and has its principal place of business at Willow Run, Michigan.

2. This Court has jurisdiction by virtue of Section 27 of the Securities Exchange Act of 1934 (Title 15, Sec. 78aa, U. S. C. A.), Section 22(a) of the Securities Act of 1933 (Title 15, Sec. 77v(a), U. S. C. A.), and Section 24 of the Judicial Code, as amended (Title 28, Sec. 41(8), U. S. C. A.).

3. At the time of the transactions hereinafter complained of plaintiff was and still is, the owner and holder of shares of stock in defendant Kaiser-Frazer. Plaintiff

brings this action on behalf of Kaiser-Frazer against the remaining defendants named in paragraph 1 (hereinafter called the individual defendants). This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

4. All of the individual defendants, at the time of the transactions hereinafter complained of were, and (upon information and belief), they now are, directors of defendant Kaiser-Frazer. In addition, they held the following respective offices in Kaiser-Frazer:

Henry J. Kaiser	Chairman of the Board
Joseph W. Frazer	President
Edgar F. Kaiser	Vice President and General Manager, Chairman of the Executive Committee
G. G. Sherwood	Treasurer, Assistant Secretary
E. E. Trefethen, Jr.	Vice President, Assistant Secretary
Clay P. Bedford	Vice President, Member of Executive Committee
W. A. MacDonald	Vice President, Assistant Secretary, Member of Executive Committee
O. B. Motter	Vice President
Hickman Price, Jr.	Vice President, Member of Executive Committee
Walston S. Brown	Secretary

Said individual defendants, at the time of the transactions hereinafter complained of, constituted the active management of defendant Kaiser-Frazer, and are hereinafter sometimes referred to as "the management".

5. Defendant Kaiser-Frazer was organized on August 5, 1945. Defendants Kaiser and Frazer were the active promoters of the corporation. They caused it to be formed and individually and through their various business enterprises supplied its initial capital. They selected and caused to be appointed its initial officers and directors, most of whom are still officers and directors of Kaiser-Frazer. The present individual defendants, other than Kaiser and Frazer, were selected as officers and directors by, and owe their appointment to, defendants Kaiser and Frazer. Defendant Edgar F. Kaiser is a son of defendant Henry J. Kaiser. Defendants Sherwood, Trefethen and Bedford are former and present associates of defendant Kaiser in other businesses and interests which are controlled by Kaiser. Defendants Price, MacDonald and Motter are present and former associates of defendant Frazer in other businesses and interests controlled by Frazer. Defendant Brown is a partner in a firm of lawyers who have been, since October 1945, and now are, general counsel of defendant Kaiser-Frazer.

6. At all times since the organization of Kaiser-Frazer defendants Kaiser and Frazer have owned, held and controlled, directly and indirectly, either a majority of the stock of said corporation or a substantial minority thereof. On information and belief, at the time of the transactions hereinafter complained of defendants Kaiser and Frazer directly and indirectly through various corporations, organizations and voting trusts which they controlled, held, owned and controlled more than 30% of the stock of Kaiser-Frazer.

7. At all times since the organization of Kaiser-Frazer said corporation has been, and it now is, completely dominated and controlled by defendants Kaiser and Frazer. At all times since the organization of said corporation the directors and officers of Kaiser-Frazer (other than Kaiser and Frazer themselves) have been, and they now are, dominated and controlled by Kaiser and Frazer.

8. The transactions hereinafter complained of were effected at the instance of defendants Kaiser and Frazer; and said Kaiser and Frazer were the primary actors in causing to be done the transactions hereinafter complained of. The remaining individual defendants, acting as officers and directors of defendant Kaiser-Frazer, participated in and approved of said transactions, and from time to time approved the various legal and corporate actions which had to be taken in order to effect said transactions.

9. On November 30, 1947, Kaiser-Frazer owed the Bank of America National Trust and Savings Association a balance of $11,280,000 on certain notes. These notes were guaranteed jointly and severally, by Joseph W. Frazer and by Henry J. Kaiser Company, the Kaiser Company, Kaiser Engineers, Inc. (hereinafter referred to as the Kaiser interests). Said Kaiser interests were corporations substantially owned and controlled by Kaiser. This balance was payable in monthly installments of $360,000 beginning on December 1, 1947, with the remaining balance payable August 1, 1949. All of the above-described notes were paid off in full by Kaiser-Frazer prior to December 31, 1947.

10. Upon information and belief:

Kaiser and Frazer caused Kaiser-Frazer to prepay the notes as above set forth. The predominant motive and reason for this action was to relieve the Kaiser interests

and Frazer of their joint and several guarantee of the above-described notes. In so doing Kaiser and Frazer caused Kaiser-Frazer to deplete its working capital to such an extent as to require new financing. This action was solely in the personal interests of Kaiser and Frazer and contrary to the interests of Kaiser-Frazer. Said prepayment was made without any commitment for such new financing from any quarter and without any assurance that such new financing could be obtained by Kaiser-Frazer on any reasonable basis.

11. About January 1948, the management of Kaiser-Frazer decided to issue and sell to the investing public new shares of stock in order to raise additional funds for Kaiser-Frazer. Such funds were necessary in order to build up the working capital of Kaiser-Frazer and to purchase certain items of plant and property which Kaiser-Frazer needed in its business.

12. About January 1948, the management of Kaiser-Frazer entered into negotiations with certain underwriters, to wit, Otis & Company, First California Company, and Allen & Company. These underwriters had previously underwritten and sold to the public shares of stock of defendant Kaiser-Frazer. It was decided that Otis & Company would be the leading underwriter. Thereafter Otis & Company and the dominating personality in that organization, to wit, Cyrus Eaton, took the lead in the negotiations with the management of Kaiser-Frazer.

13. Upon information and belief:

After preliminary negotiations, an underwriting contract was entered into between Kaiser-Frazer, Otis & Company, First California Company and Allen & Company, whereby said underwriters agreed to purchase from Kaiser-Frazer 1,500,000 shares of new stock of said corpora-

tion. The purchase price and the resale price to the public were left blank.

14. In the month of January 1948, a registration statement, covering the proposed offering of said 1,500,000 shares, was filed with the Securities and Exchange Commission. Such registration statement, however, was not complete and therefore was not permitted to become effective, until February 3, 1948, after 3 p.m., Eastern Standard Time, of that date, which was the time of closing of the market on the New York Curb Exchange.

15. At and long prior to the transactions complained of the stock of Kaiser-Frazer was registered on several national securities exchanges, to wit, The New York Curb Exchange, the principal market for said stock (hereinafter called the Curb Exchange), the San Francisco Stock Exchange, the Los Angeles Stock Exchange, the Detroit Stock Exchange and the Boston Stock Exchange. During the year 1947 and the year 1948 up to and including February 2, 1948, the price of said stock on the Curb Exchange had fluctuated from a high of $18.25 to a low of $5 per share. The price of the said stock on the other exchanges above-named were at all times substantially identical with the contemporaneous price on the Curb Exchange. Said fluctuation was due in part to the fact that Kaiser-Frazer was a new corporation and, to a greater extent, to the fact that Kaiser-Frazer was engaged in the business of manufacturing automobiles and the automobile business had been a very difficult business for newcomers.

16. At the time of the transactions hereinafter complained of Kaiser-Fraser was confronting difficulties in addition to the difficulties due to the highly competitive nature of the automobile business and to the fact that Kaiser-Frazer was a newcomer therein. These difficulties arose from the nationwide shortage of steel and other

materials. Upon information and belief, the principal steel companies and other suppliers of steel had traditional relationships with the older established automobile companies and, to a certain extent, gave these companies a preference in purchasing available steel. As a result, Kaiser-Frazer was forced to purchase part of its steel requirements at prices higher than those paid by its competitors; and for other parts of such requirements it was required to engage in various barter deals, resulting in cross-hauling of material and other uneconomic transactions. The result of these practices was necessarily to increase the cost of steel and other materials to Kaiser-Frazer and to put it in a poor competitive position as contrasted with the older companies. These facts were well known to the better informed members of the investing public; and the management of Kaiser-Frazer knew that in the registration statement and prospectus filed pursuant to the Securities Act of 1933 the corporation would be required to make a full disclosure with respect to these facts.

17. It was recognized by the management of Kaiser-Frazer that the public would not purchase new shares of stock of Kaiser-Frazer at a price in excess of the price at which existing shares of such stock could be purchased on the market. For this reason, throughout the said month of January, said management and underwriters watched the daily market price of said stock. It was the plan of said management and underwriters that when it was agreed that the market was satisfactory, the offering of new shares would be made at or about the market price.

18. On February 2, 1948, the market for Kaiser-Frazer stock on the Curb Exchange closed at 13½. 6,800 shares of said stock were sold on that day at prices ranging from a low of 13⅜ to a high of 13¾. The closing bid and asked price was 13½-13⅝. There were active conversations

between the management of Kaiser-Frazer and the underwriters during and preceding February 2, 1948. Defendant Kaiser took the lead on behalf of the Kaiser-Frazer management and Eaton of Otis & Company took the lead on behalf of the underwriters. As a result of said conversations said management and underwriters, prior to the opening of the market on February 3, 1948 (10:00 a.m., Eastern Standard Time) verbally agreed that on said day Kaiser-Frazer would enter firm bids on the Curb Exchange and on the other national securities exchanges mentioned in paragraph 15 hereof, at 13½; and that Kaiser-Frazer would purchase all the stock offered at said price. At the same time preparations were being carried forward by the lawyers for Kaiser-Frazer and for the underwriters to complete the registration statement and the prospectus and to have the registration statement become effective. It was planned that such registration statement would become effective after the close of the market (3 p.m., Eastern Standard Time) on February 3, 1948.

19. Before the registration statement and prospectus could become effective it was necessary, as said management and underwriters well knew, for the underwriting agreement to be put in final form and executed. This necessitated the filling in of the blanks previously existing in the contract respecting the price which the underwriters should pay to Kaiser-Frazer and the price at which the stock should be sold to the public. Said management and underwriters well knew that in order for the underwriters to be able to sell to the public at the specified price the market price would have to equal or exceed the proposed offering price. This was the reason for the verbal agreement between said management and underwriters that defendant Kaiser-Frazer should, on February 3, 1948, purchase all the stock that was offered on the Curb Exchange at 13½.

20. Prior to the opening of the market on February 3, 1948, Kaiser-Frazer placed through its brokers on the Curb

Exchange and on the other national securities exchanges mentioned in paragraph 15 hereof orders to purchase at 13½ all stock which was offered. Almost immediately after the opening of the market it became apparent that the offers of stock were, and would continue to be, much greater than had been contemplated. With full notice of said fact, and after discussing it, the management continued in force and did not withdraw the orders previously given to its brokers and continued to purchase all Kaiser-Frazer stock offered on said national securities exchanges at 13½. Prior to the close of the market on that day Kaiser-Frazer purchased on said national securities exchanges 186,200 shares of its stock. Most of said purchases were made on the Curb Exchange and said transactions and acts occurred and took place in the City, County and State of New York. Said purchases constituted and accounted for the bulk of the trading on said exchanges on that day in the stock of Kaiser-Fraser. The price paid for said stock, plus brokers' commissions, was in excess of $2,500,000.

21. Throughout the day representatives of said underwriters and said management were in touch with personnel of the Securities and Exchange Commission, making every effort to see that the registration statement became effective at the close of the market on that day. During the course of the day said representatives of the Securities and Exchange Commission were informed of the tremendous volume of offerings of Kaiser-Frazer stock; and prior to the closing of the market said representatives of the Securities and Exchange Commission informed said management and underwriters that a full disclosure would have to be made in the prospectus respecting said purchases. Accordingly, a statement was included in the prospectus respecting said purchases in which it was stated that by 1:15 p. m. Kaiser-Frazer had purchased 103,500 shares of its stock at 13½ per share; and after the close of the market and before the registration statement became effective, a rider was

placed on the outside of said prospectus stating that during the entire trading day Kaiser-Frazer had purchased 186,200 shares of its stock at 13½ per share.

22. By virtue of their position as officers and directors the individual defendants stood in a fiduciary relationship to Kaiser-Frazer. As officers and directors they owed it a duty to manage its affairs with due care and with due regard to the laws of the land. A particular and additional fiduciary duty rested on defendants Kaiser and Frazer by virtue of the fact that they were not only officers and directors of Kaiser-Frazer but were its managing and controlling stockholders.

23. In carrying out the transactions hereinabove complained of said individual defendants directly and indirectly through Kaiser-Frazer, by the use of the mails and means and instrumentalities of interstate commerce and by the use of facilities of national securities exchanges above-mentioned, effected a series of transactions in the stock of Kaiser-Frazer which was registered on said national securities exchanges, creating actual active trading in such stock for the purpose of inducing the purchase by the investing public of the stock of Kaiser-Frazer to be issued pursuant to said registration statement.

24. In carrying out the transactions hereinabove complained of said individual defendants violated and caused Kaiser-Frazer to violate Section 9(a)(2) of the Securities Exchange Act of 1934, which provides as follows:

> "Sec. 9(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—
>
> • • • • • •

"(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

25. In carrying out the transactions hereinabove complained of said individual defendants directly and indirectly through Kaiser-Frazer, by the use of means and instrumentalities of interstate commerce and by the use of the mails and of the facilities of the national securities exchanges above-mentioned, did the following:

(a) They employed a device, scheme and artifice to defraud those members of the investing public who should purchase new shares of Kaiser-Frazer in reliance on the artificial price established by said purchases of stock; and

(b) In expending the funds of defendant Kaiser-Frazer for the purpose of doing an illegal act they acted in breach of their fiduciary duty to Kaiser-Frazer and committed a fraud upon said Kaiser-Frazer.

26. In carrying out the transactions hereinabove complained of said individual defendants violated and caused Kaiser-Frazer to violate Section 10(b) of the Securities Exchange Act of 1934 and Rule X-10B-5 under that law, subparagraphs (1) and (3), which respectively provide as follows:

"Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange——

* * * * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule X-10B-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

* * * * * * *

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

27. In carrying out the transactions hereinabove complained of, said individual defendants violated and caused Kaiser-Frazer to violate Section 17(a)(1) and (3) of the Securities Act of 1933, which provides as follows:

"Sec. 17 (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly——

"(1) to employ any device, scheme, or artifice to defraud, or

* * * * * * *

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

28. The actions of the individual defendants in causing to be carried out the transactions above-mentioned constituted a deliberate, or, in the alternative, a negligent waste of the funds of Kaiser-Frazer. The failure of said defendants to withdraw the purchase orders immediately after it became apparent that a tremendous number of shares, and a number greatly in excess of the shares contemplated, was being or would be unloaded upon Kaiser-Frazer, was particularly culpable.

29. The transactions herein complained of resulted in great loss and damage to Kaiser-Frazer in that

(a) the shares purchased were worth substantially less than the amounts, in excess of $2,500,000, expended in their purchase; and

(b) by virtue of the transactions referred to in paragraphs 10 and 20, the cash of Kaiser-Frazer was substantially reduced. Accordingly, its ability to meet its obligations, carry on its business and make the necessary additions to plant was substantially impaired. As a result Kaiser-Frazer was forced to make material reductions in its operations and in its production of automobiles. As a further result Kaiser-Frazer lost substantial amounts of money and its capacity and ability to produce in the future was materially impaired.

30. Plaintiff has made no demand on the directors of Kaiser-Frazer to bring an action to redress the injuries to Kaiser-Frazer caused by the transactions herein complained of. The reason for plaintiff's failure to make such a demand is that all of said directors are defendants herein

and all of said directors are jointly and severally responsible and liable for the transactions herein complained of. In addition, the individual defendants, other than Kaiser and Frazer, are, as above stated, dominated and controlled by defendants Kaiser and Frazer. Under these circumstances, any demand would be futile.

WHEREFORE, plaintiff prays for the following relief:

(a) That the individual defendants be ordered and directed to purchase from Kaiser-Frazer the number of shares of stock which Kaiser-Frazer purchased on February 3, 1948, paying therefor the price which was paid by Kaiser-Frazer, together with all commissions and other expenses paid and incurred in connection with said purchases.

(b) That the defendant Kaiser-Frazer recover from the individual defendants the damages resulting from the expenditure of cash in the purchase of said shares of stock; and that an accounting be had for the purposes of ascertaining the damages which have been caused to Kaiser-Frazer over and above the amount of money which was expended in the purchase of said stock; and that the individual defendants account for and restore to Kaiser-Frazer the sums found to be due on such accounting; and

(c) That the Court grant to plaintiff and Kaiser-Frazer Corporation such other and further relief as may be just and proper.

LEWIS M. DABNEY, JR.
Lewis M. Dabney, Jr.

ANDERSON & CAREW
Anderson & Carew

LEWIS M. DABNEY, JR.,
JOHN A. ANDERSON,
ISADORE H. COHEN,
Of Counsel.

(Verified by Michael Stella May 10, 1948.)

Order to Show Cause.

[SAME TITLE.]

Upon the annexed affidavit of Mark F. Hughes, verified the 24th day of November, 1953 and all prior proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show cause at a term of this Court to be held in Room 506 of the United States Court House, Foley Square, City, County and State of New York, on the 10th day of December, 1953 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Rule 56 of the Federal Rules of Civil Procedure granting to the defendants summary judgment and dismissing the complaint herein upon the ground that the claims asserted in this action have been settled, compromised and discharged by an agreement of settlement approved by an order of the United States District Court for the Eastern District of Michigan, Southern Division, in an action entitled *Pergament, et al.* v. *Joseph W. Frazer, et al.*, 93 F. Supp. 9, aff'd 203 F. 2d 315 (6th Cir. 1953) cert. denied October 12, 1953, Docket No. 133, and granting such other further and different relief as to the Court may seem just and proper; and sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order and the moving affidavit upon one of the attorneys of record for the plaintiff on or before the 28th day of November, 1953 be deemed good and sufficient service upon said plaintiff, and it is further

ORDERED, that a notice, substantially in the form of Exhibit 4 annexed to the moving affidavit, be published once by the defendant Kaiser-Frazer Corporation on or before the 30th day of November, 1953 in the New York Times, and it is further

ORDERED, that the publication of said notice in said newspaper as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of Kaiser-Frazer Corporation pursuant to Rule 23 (c) of the Federal Rules of Civil Procedure, and it is further

ORDERED, that a copy of this order and the moving affidavit be filed in the office of the Clerk of this Court on or before the 28th day of November, 1953, and it is further

ORDERED that answering affidavits shall be served on or before the 8th day of December, 1953.

Dated: New York, New York,
November 24, 1953.

THOMAS F. MURPHY,
U. S. D. J.

Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

[SAME TITLE.]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MARK F. HUGHES, being duly sworn, deposes and says:

I am a member of the firm of Willkie Owen Farr Gallagher & Walton, attorneys for the defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation, and for convenience hereinafter referred to as "Kaiser-Frazer." I make this affidavit in support of a motion for summary judgment dismissing the action upon the ground that the subject matter of the action has been compromised and settled and that a release of the claim set forth in the

complaint constitutes a bar to the further prosecution of the action.

This is a stockholders' derivative action on behalf of Kaiser-Frazer which was commenced in May, 1948 and is now at issue. The complaint alleges that in connection with a contemplated public offering of 1,500,000 additional shares of Kaiser-Frazer common stock on February 3, 1948, the individual defendants as officers and directors of Kaiser-Frazer caused it to stabilize the market in the stock at 13½, with the result that it bought 186,200 shares of stock at a cost in excess of $2,500,000. The complaint charges that the stabilization transactions constituted illegal manipulation and were either a deliberate or negligent waste of the funds of Kaiser-Frazer by the individual defendants, which caused Kaiser-Frazer to sustain damages. The several answers, while admitting the stabilization operations, denied that they constituted illegal manipulation or waste.

This action has remained dormant pending the outcome of another stockholders' derivative action instituted in the United States District Court for the Eastern District of Michigan, Southern Division, known as the *Pergament* action, hereinafter more fully described. Because of the settlement of the *Pergament* action, with the approval of the District Court in Michigan, it is now appropriate and proper that summary judgment be granted herein dismissing this action.

Also in May, 1948, an action was instituted in the District Court of the United States for the Eastern District of Michigan, Southern Division, entitled *Jerome R. Pergament and George J. London, etc., plaintiffs,* v. *Joseph W. Frazer, et al., defendants* (Civ. No. 7354). This action was also a stockholders' derivative action brought on behalf of Kaiser-Frazer and naming as defendants, among others, certain of the individual defendants who were joined as defendants in this action. The complaint in the *Pergament* action, as amended, contained various allega-

tions of malfeasance on the part of the officers and directors of Kaiser-Frazer Corporation, including the charges with reference to the stabilization transactions which were the subject matter of the complaint in this action. In the *Pergament* case also the allegations of wrong doing were denied. While the *Pergament* case was pending, the plaintiffs in that action entered into an agreement with the individual and corporate defendants compromising and settling the various causes of action alleged in the complaint in that action, as amended, including the claim or cause of action constituting the subject matter of this action. The settlement agreement provided, among other things, for the release and discharge of each of the individual defendants in this action from any and all liability with respect to the purchase by Kaiser-Frazer of 186,200 shares in the stabilization transactions which are the subject matter of this action. The settlement agreement was subject to the approval of the District Court of the United States for the Eastern District of Michigan pursuant to the provisions of Rule 23(c).

Accordingly, on November 9, 1949 the District Court in Michigan ordered a hearing on the settlement agreement and directed that notice be given to all stockholders. A copy of the order to show cause, notice of hearing, petition of the plaintiff stockholders, settlement agreement, and the amended pleadings in the action are hereto annexed and marked "Exhibit 1." Thereafter and while the hearings on the settlement were in progress, the District Judge directed that a second notice be given to all of the stockholders of Kaiser-Frazer Corporation. A copy of this second notice is hereto annexed marked "Exhibit 2." A copy of each of said notices was duly mailed to each of the stockholders of record of Kaiser-Frazer as directed by said Court. After extended hearings in which all interested parties were given opportunity to be heard and to present their evidence, both in support of and in opposi-

tion to the settlement agreement, the compromise and settlement embraced in said agreement was approved by the District Court in Michigan by order dated September 13, 1950. A copy of said order of approval is hereto annexed marked "Exhibit 3." An appeal from the order of approval was taken by certain stockholders, including the plaintiff in this action, who had opposed the approval of the settlement agreement, with the result that the order of approval was affirmed by the Court of Appeals for the Sixth Circuit. A petition for a writ of certiorari by the objecting stockholders, including the plaintiff in this action, was denied by the Supreme Court of the United States on October 12, 1953 (*Pergament, et al.* v. *Frazer, et al.*, 93 F. Supp. 9, aff'd 203 F. 2d 315, cert. denied 346 U. S. 832). The time of the objecting stockholders to petition to the Supreme Court for a rehearing has expired. As a consequence, the approval of the compromise has become final and the terms of the settlement agreement have become effective, including the provision in paragraph 2 thereof releasing and discharging various individuals and corporations, including the defendants in this action, from all further liability in connection with the matters which constitute the subject matter of this action.

As has already been noted, all of the stockholders, including the plaintiff in this action, were given ample notice of the proceedings in the District Court in Michigan relating to the approval of the settlement agreement. In view of that and because it is so obvious that the settlement agreement, as approved by the District Court in Michigan, constitutes a valid plea in bar in this action, it would seem to be a sufficient compliance with the requirement of Rule 23(c) as to notice if a notice of hearing in the form hereto annexed marked "Exhibit 4" should be published once in a newspaper of general circulation in the City of New York. This was the procedure followed by Judge Rifkind in *Brendle* v. *Smith*, 7 F. R. D. 119. For

that reason an order to show cause is requested providing for the publication of a notice in substantially the form submitted herewith in a newspaper of general circulation in the City of New York. Although opposition to this motion appears unlikely, deponent requests that provision be made for the service of answering affidavits five days prior to the return day so that if opposition develops, the defendants may have the opportunity to submit papers in reply.

No previous application for the relief sought herein has been requested of any other Court or Judge.

MARK F. HUGHES.

Sworn to before me this 24th day of November, 1953.

.....

AUGUSTA L. PACKER
Notary Public, State of New York
No. 24-2994000
Qualified in Kings County
Certificates filed in Kings, Queens, New York, Richmond, Bronx, Westchester Nassau and Suffolk County Clerk's Offices and in Kings, Queens, New York and Bronx County Registers' Offices
Term Expires March 30th, 1955

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Order to Show Cause

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7304.

Upon the annexed duly verified petition of Jerome R. Pergament, George J. London and Kaiser-Frazer Corporation, and upon all prior pleadings and proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment

cause at a Term of this Court, to be held at Room 712 of the Federal Building, 231 W. Lafayette Street, in the City of Detroit, State of Michigan, on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made

(a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation, and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Coporation and Permanente Products Company, dated October 25, 1949, a copy of which is annexed to said petition marked Exhibit 1;

(b) directing that the said agreement be carried out and put into effect;

(c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys;

(d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof;

(e) granting such other, further and different relief as to the Court may seem just and proper;

and, sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order to show cause and the annexed petition upon the attorneys of record of the respective defendants, whose offices are located within this District, on or before the 15th day of November, 1949, be deemed good and sufficient service upon said defendants, and it is further

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

ORDERED, that a copy of this order, of the annexed petition, of a notice of hearing in substantially the form hereto annexed marked Exhibit A, of the amended complaint and of the plaintiffs' notice of motion to amend and supplement the amended complaint, be mailed on or before the 21st day of November, 1949, by the defendant Kaiser-Frazer Corporation to each of the stockholders of said defendant of record as of the 31st day of October, 1949, and that for that purpose, the said defendant Kaiser-Frazer Corporation shall print a sufficient number of copies of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint, and it is further

ORDERED, that a notice substantially in the form of Exhibit A annexed to this order be published once by the defendant Kaiser-Frazer Corporation on or before the 23rd day of November, 1949; in the following newspapers of general circulation: the Detroit Legal News in the City of Detroit, Michigan, the New York Times in the City of New York, N. Y., the Chicago Daily News in the City of Chicago, Illinois, the San Francisco Chronicle in the City of San Francisco, California, and the Reno Evening Gazette in the City of Reno, Nevada, and it is further

ORDERED, that the mailing of a copy of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint and the publication of said notice of hearing as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of the defendant Kaiser-Frazer Corporation pursuant to Rule 23 (d) of the Rules of Civil Procedure.

Dated, Detroit, Michigan, November 9th, 1949.

FRANK A. PICARD
United States District Judge

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT A

Notice of Hearing.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, *against* JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION, Defendants.	Civil No. 7354.

To All Stockholders of the Defendant, Kaiser-Frazer Corporation:

By order of Hon. Frank A. Picard, Judge of the United States District Court for the Eastern District of Michigan, dated November 9th, 1949, a hearing will be held in said Court at Room 712 of the Federal Building, 231 W. Lafayette Street in the City of Detroit, State of Michigan,

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, upon an application by the plaintiffs, Jerome R. Pergament and George J. London, and by defendant Kaiser-Frazer Corporation, for an order of said Court (a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation and Permanente Products Company, dated October 25th, 1949, a copy of which is annexed to said petition, marked Exhibit 1; (b) directing that the said agreement be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof; and (e) granting such other, further and different relief as to the Court may seem just and proper.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or to the stockholders of Kaiser-Frazer Corporation other than the announcement of the adjourned date at the hearing.

Dated, November 9th, 1949.

SAMUEL L. CHESS,
FISCHER & FISCHER,
PERLMAN, GOODMAN, HECHT & CHESLER,
Attorneys for Plaintiffs.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,
WILLKIE OWEN FARR GALLAGHER & WALTON,
Attorneys for Defendant,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Petition

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

To the Honorable the Judges of the United States District Court for the Eastern District of Michigan:

The petition of Jerome R. Pergament and George J. London, by Samuel L. Chess and Fischer & Fischer and Perlman, Goodman, Hecht & Chesler, their attorneys, and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

of Kaiser-Frazer Corporation, by its attorneys, Butzel, Eaman, Long, Gust & Kennedy and Willkie Owen Farr Gallagher & Walton, respectfully shows to the Court as follows:

1. That your petitioners, Jerome R. Pergament and George J. London, are the plaintiffs in the above-entitled action and that your petitioner, Kaiser-Frazer Corporation, is a defendant in said action.

2. The defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr. and Kaiser-Frazer Corporation have appeared and answered. That the defendants, The Permanente Metals Corporation and Permanente Products Company have not yet answered. That by a memorandum and order entered October 12, 1949, this action has been dismissed as against the defendants United States of America and Reconstruction Finance Corporation. That the defendant Otis & Co. has been served with a summons and complaint and has made a motion to dismiss the action and to quash the return of service of process, which motion is now pending undecided. That the remaining named defendants have not been served with the summons and complaint. That the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald and Hickman Price, Jr. are hereinafter collectively referred to as the "individual defendants."

3. That on October 22, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, served and filed a notice of motion to amend and supplement the amended complaint at the opening of the trial of the action so as to include alleged acts of misfeasance and neglect on the part of the individual defendants and others, not theretofore alleged in the amended complaint, resulting in loss and damage to your petitioner, the defendant Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

4. That on October 25, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, and acting on behalf of themselves and on behalf of all other stockholders of the defendant Kaiser-Frazer Corporation, entered into a written agreement with your petitioner, the defendant Kaiser-Frazer Corporation, and with the individual defendants and the defendants The Permanente Metals Corporation and Permanente Products Company to dismiss and compromise this action and the claims set forth in the amended complaint and the aforesaid notice to amend and supplement the amended complaint upon the terms and conditions therein provided, including, among others, the condition that the compromise therein provided for shall be approved by this court in accordance with the provisions of Rule 23(c) of the Rules of Civil Procedure. Annexed hereto, marked Exhibit 1, is a true copy of said agreement; and annexed hereto, marked Exhibit 2, is a list of the metal presses and related equipment referred to in paragraph 1(d) of said agreement.

5. That, in the opinion of your petitioners, said agreement provides for a fair and reasonable disposition of the claims and matters in controversy in this action and that it is in the interest of your petitioner, the defendant Kaiser-Frazer Corporation, and of your petitioners, Jerome R. Pergament and George J. London, and of all other stockholders of the defendant Kaiser-Frazer Corporation that said agreement be approved by this Court pursuant to said Rule 23(c) and that the provisions of said agreement be carried out and put into effect.

6. That it is necessary and desirable that a hearing be held by this Court to consider said agreement and thereupon to make such order in the premises as may be just and proper, and that appropriate notice of such hearing be given to all of the parties of record and to all of the stockholders of record of the defendant Kaiser-Frazer Corporation—for all of which an order to show cause is requested.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

7. That no previous application for the relief herein requested has been made to any other court or judge.

WHEREFORE, your petitioners pray

1. That an order be entered (a) approving the agreement, Exhibit 1 hereto annexed; (b) directing that the same be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; and (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof.

2. That an order to show cause issue fixing a time and place for a hearing upon this petition, and providing for appropriate notice to all the stockholders of the defendant Kaiser-Frazer Corporation of the time, place and purpose of said hearing; and

3. That the court grant to your petitioners such other, further and different relief as to the Court may seem just and proper.

JEROME B. PERGAMENT
GEORGE J. LONDON
Plaintiffs-Petitioners.

SAMUEL L. CHESS
Samuel L. Chess,
17 John Street,
New York 7, N. Y.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

FISCHER & FISCHER,

By KENNETH FISCHER
Member of the Firm,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.
Attorneys for Plaintiffs-Petitioners.

KAISER-FRAZER CORPORATION,
By J. F. REIS
Vice-President,
Defendant-Petitioner.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,

By A. HILLIARD WILLIAMS
Member of the Firm,
1881 National Bank Building,
Detroit 26, Michigan.

WILLKIE OWEN FARR GALLAGHER & WALTON
15 Broad Street,
New York 5, New York,
Attorneys for Defendant-Petitioner,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JEROME R. PERGAMENT

Sworn to before me this 2 }
day of November, 1949. }

ANNA K. ROSENTHAL
Notary Public.

ANNA K. ROSENTHAL
Notary Public, State of New York
Residing in Bronx Co. No. 84, Reg. No. 233-R-0
Cert. filed in N. Y. Co. No. 296, Reg. No. 241-R-0
Commission Expires March 30, 1950.

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE J. LONDON

Sworn to before me this 3 }
day of November, 1949. }

BENJAMIN KIRSHBAUM
Notary Public.

My Commission Expires March 7, 1952

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF MICHIGAN, } ss.:
COUNTY OF WAYNE, }

J. F. REIS, being sworn, deposes and says that he is Vice-President of KAISER-FRAZER CORPORATION, defendant-petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

J. F. REIS

Sworn to before me this 7th day of November, 1949.

ELIZABETH V. HAND
Notary Public, Wayne County, Michigan
My Commission Expires April 7, 1951.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT 1

THIS AGREEMENT made and entered into as of this 25th day of October, 1949, by and between JEROME R. PERGAMENT and GEORGE J. LONDON (hereinafter called "the plaintiffs") and JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, CLAY P. BEDFORD, W. A. MACDONALD and HICKMAN PRICE, JR. (hereinafter called "the individual defendants") and THE PERMANENTE METALS CORPORATION and PERMANENTE PRODUCTS COMPANY (hereinafter called "the corporate defendants") and KAISER-FRAZER CORPORATION (hereinafter called "Kaiser-Frazer").

WITNESSETH:

WHEREAS, the plaintiffs have heretofore filed and there is now pending in the United States District Court for the Eastern District of Michigan an action on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer, which action is entitled "Jerome R. Pergament and George L. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, against Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation, Otis & Co., Cyrus Eaton, The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation, Defendants", Civil No. 7354, which action is hereinafter referred to as "the stockholders derivative action", and

WHEREAS, on or about the 22nd day of October, 1949, the plaintiffs served a notice of intention to amend and sup-

plement the amended complaint so as to include additional allegations and prayers for relief, and

WHEREAS, subject to the approval of the Court pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure, the parties desire to dismiss and compromise the stockholders derivative action and to resolve all of the controversies raised by the allegations of the amended complaint and the notice of intention to amend and supplement the amended complaint and the answers thereto, together with any and all matters or claims hereinafter referred to, and

WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,503.30.

2. Subject only to the provisions of paragraph 7 hereof, Kaiser-Frazer and the plaintiffs on their own

behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right hereby agree to release and discharge and hereby do release and forever discharge the individual defendants, the corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns; as well as their officers, agents and employees of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against said individual defendants, corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

(formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, said Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right, ever had, now have or which they or their heirs, executors, administrators, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, including without limitation of the generality of the foregoing any and all claims, charges and allegations set forth in the amended complaint and the notice to amend and supplement the amended complaint including

(a) The purchase or authorization of the purchase by Kaiser-Frazer Corporation on or about February 3, 1948 of 186,200 shares of the common stock of Kaiser-Frazer.

(b) All acts and transactions relating to or in connection with a proposed offering of common stock of Kaiser-Frazer, a Registration Statement covering which was made effective by the Securities and Exchange Commission on February 3, 1948.

(c) The making of certain contracts dated September 20, 1946, December 1, 1947 and December 12, 1947 between Kaiser-Frazer and Graham-Paige Motors Corporation, including all agreements supplementary and amendatory thereof and all acts and

transactions under or in connection therewith, and in addition each and every transaction between Graham-Paige Motors Corporation and Kaiser-Frazer and payments made on account thereof.

(d) The following transactions of The Permanente Metals Corporation:

(i) The assignment by Kaiser-Frazer Corporation to The Permanente Metals Corporation of a certain letter of intent dated March 27, 1946 covering the proposed lease of Plancors Nos. 524 and 1061 from War Assets Administration to Kaiser-Frazer, and the subsequent lease and purchase of said Plancors Nos. 524 and 1061 by The Permanente Metals Corporation.

(ii) The procurement by Kaiser Metal Products, Inc. of a letter of intent with reference to a certain aluminum reduction plant at Head, Washington, the subsequent assignment of said letter of intent to The Permanente Metals Corporation, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iii) The procurement by The Permanente Metals Corporation of a letter of intent with reference to a certain alumina plant at Baton Rouge, Louisiana, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iv) The procurement by The Permanente Metals Corporation of a letter of intent to purchase an aluminum fabricating plant at Newark, Ohio, and the subsequent purchase thereof by The Permente Metals Corporation.

(v) All other transactions between Kaiser-Frazer and The Permanente Metals Corporation,

including, without limitation of the generality of the foregoing, purchases of aluminum by Kaiser-Frazer from The Permanente Metals Corporation; and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(e) All transactions whereunder Kaiser-Frazer leased a certain plant located at Long Beach, California from War Assets Administration, operated such plant, paid rentals thereon, maintained the same and manufactured farm equipment therein for Graham-Paige Motors Corporation, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(f) All transactions between Kaiser-Frazer and Kaiser Metal Products, Inc., including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer paid the cost of experimental work incurred by Kaiser Metal Products, Inc., paid the cost of equipment acquired and installed in the plant of said Kaiser Metal Products, Inc., released an option to buy the plant of Kaiser Metal Products, Inc. at Bristol, Pa., permitted to remain in said plant certain equipment owned by Kaiser-Frazer and purchased, at prices claimed to have been excessive, automotive parts from Kaiser Metal Products, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(g) All transactions between Kaiser-Frazer and Kaiser Steel Corporation, including, without limita-

tion of the generality of the foregoing, transactions whereby Kaiser-Frazer purchased certain steel products from Kaiser Steel Corporation and entered into and maintained in effect a management contract for the operation of a certain blast furnace at Provo, Utah, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons or corporations hereinabove in this paragraph 2 mentioned.

(h) All transactions between Kaiser-Frazer and Kaiser Industries, Inc., including, without limitation of the generality of the foregoing, transactions whereunder Kaiser-Frazer obtained engineering services from Kaiser Industries, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and other persons or corporations hereinabove in this paragraph 2 mentioned.

(i) The transaction whereunder Kaiser-Frazer on or about December 27, 1947 repaid in full the outstanding principal amount of a loan made to Kaiser-Frazer by Bank of America, National Trust and Savings Association, including all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants, and the other persons or corporations hereinabove in this paragraph 2 mentioned.

3. Nothing contained in this agreement shall in anywise release or discharge Otis & Co. or any officer, director or stockholder of Otis & Co. from any claim Kaiser-Frazer may have against any one or more of them, including, without limitation of the generality of the foregoing, the action instituted by Kaiser-Frazer against Otis & Co. in the United States District Court

for the Southern District of New York entitled "Kaiser-Frazer Corporation, plaintiff, against Otis & Co., defendant", Civil Action No. 45-564, and a certain counterclaim and third party complaint against James F. Masterson, Otis & Co., Cyrus S. Eaton, et al., in an action entitled "James F. Masterson, plaintiff, against Kaiser-Frazer Corporation, et al., defendants" now pending in the United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 7365. The plaintiffs recognize and agree that Kaiser-Frazer shall prosecute or otherwise dispose of such claims as in the discretion of its Board of Directors is deemed advisable.

4. Nothing contained in this agreement shall in anywise discharge or release Graham-Paige Motors Corporation from or in respect of the claim or claims asserted against said Graham-Paige Motors Corporation in an action entitled "Michael Stella against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation" pending in the United States District Court for the Southern District of New York, Civil Action No. 51-92 and in the action entitled "Michael Stella, plaintiff, against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation, defendants" pending in the United States District Court for the Eastern District of Michigan, Civil Action No. 8344.

5. In entering into this agreement, the individual defendants and the corporate defendants do not admit or concede the truth of or liability for any of the allegations, matters or things set forth or referred to in the amended complaint and the notice to amend and supplement the amended complaint in the stockholders derivative action or any of the matters and things referred to herein. In the event that this agreement and the compromise and settlement herein agreed to shall not

be approved pursuant to Rule 23(c) of the Rules of Civil Procedure as more fully provided in paragraph 7 hereof; this agreement shall not be offered in evidence or otherwise used by or against any of the parties hereto for any purpose whatever.

6. As soon after the execution of this agreement as is feasible, the plaintiffs and Kaiser-Frazer will make an appropriate application to the District Court of the United States for the Eastern District of Michigan, Southern Division, for an order pursuant to Rule 23(c) of the Rules of Civil Procedure approving this agreement and providing for the dismissal and compromise of the derivative stockholders action in accordance with its terms.

7. This agreement is subject to the approval of the District Court of the United States for the Eastern District of Michigan, Southern Division, pursuant to the provisions of said Rule 23(c). If for any reason the court should fail to make an order approving this agreement and dismissing and compromising the stockholders derivative action in accordance with its terms, this agreement and all of the terms and conditions hereof shall be null and void and of no force and effect whatsoever and none of the parties hereto shall be bound or prejudiced thereby.

8. The parties agree that they shall execute any further agreements and writings and perform any and all acts necessary or proper to carry out the purpose and intentions of this agreement.

9. This agreement may be executed in any number of counterparts, any one of which when executed by any of the parties hereto shall be deemed an original

for all purposes. If any of the individual defendants or corporate defendants should fail to enter into this agreement, it shall nevertheless be effective as to all of the parties signatory hereto; and, in such event, any such individual defendant or corporate defendant shall be entitled to the benefits of paragraph 2 hereof.

IN WITNESS WHEREOF, the individual parties have hereunto set their hands and seals and the corporate defendants and Kaiser-Frazer Corporation have caused these presents to be executed by their duly authorized officers as of the day and year first above written.

JEROME R. PERGAMENT (L. S.)

Jerome R. Pergament

GEORGE J. LONDON (L. S.)

George J. London

On their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated

JOSEPH W. FRAZER (L. S.)

Joseph W. Frazer

HENRY J. KAISER (L. S.)

Henry J. Kaiser

EDGAR F. KAISER (L. S.)

Edgar F. Kaiser

CLAY P. BEDFORD (L. S.)

Clay P. Bedford

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

W. A. MacDonald (L. S.)

W. A. MacDonald

Hickman Price, Jr. (L. S.)

Hickman Price, Jr.

The Permanente Metals Corporation

By E. E. Trefethen, Jr.

Vice-President

Permanente Products Company

By E. E. Trefethen, Jr.

Vice-President

Kaiser-Frazer Corporation

By J. F. Reis

Vice-President

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT 2

Complete List of Presses and Equipment Referred to in Paragraph 1(d) of Agreement dated October 25, 1949 between Jerome R. Pergament, George J. London, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation, Permanente Products Company and Kaiser-Frazer Corporation.

Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. Ser. No.
1	Type F-4400-108 Press	Clearing Mach. Corp.	11345	50000
1	Type F-4400-108 Press	Clearing Mach. Corp.	11344	50001
1	Type F-4400-108 Press	Clearing Mach. Corp.	11342	50002
1	Type F-4400-108 Press	Clearing Mach. Corp.	11343	50003
1	Type F-4400-108 Press	Clearing Mach. Corp.	11346	50004
1	Type F-4400-108 Press	Clearing Mach. Corp.	11320	50005
1	Type F-4400-108 Press	Clearing Mach. Corp.	11319	50006
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11376	50007
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11375	50008
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11374	50009
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11373	50010
1	Type ET-380-108 Press	E. W. Bliss Co.	11379	50015
1	Type ET-380-108 Press	E. W. Bliss Co.	11378	50016

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Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. Ser. No.
1	Type 2E-180-72 Press	E. W. Bliss Co.	11384	50017
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11386	50018
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11387	50019
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11388	50020
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11389	50021
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11393	50022
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11394	50023
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11391	50024
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11392	50025
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11400	50026
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11399	50027
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11397	50028
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11398	50029
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11395	50030
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11396	50031

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Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. No.
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11390	50032
1	Type DF-1480-48 Press	Clearing Mach. Corp.	11479	50033
	Scrap Boxes	Unknown		50034
1	Platform Scale	Yale & Towne	350378	50035
1	Alligator Shear	Doelger & Kirsten	Unknown	50037
1	Scrap Conveyor & Belt	Industrial Eng. Co.	350350	50038
1	Towmotor Ford	Ford Motor Co.	Unknown	50039
1	5-Ton Crane	Harmschteger Co.	Unknown	50040
1	10-Ton Crane	Whiting Corp.	Unknown	50041
1	15-Ton Crane	Whiting Corp.	350075	50042
840'	Overhead Conveyor #1	Jarvis B. Webb Co.	350058	50043
1084'	Overhead Conveyor #2	Jarvis B. Webb Co.	350057	50044
1	Washer & Dryer	Schmeig Industries	350336 350344	50052 50053
1	Niagara Shear	Niagara Co.	350002	50054
1	Testing Machine	Tinus Olsen Mach. Co.	350022	50055
1	Carrier Lift Truck	Ross Carrier Co.	350327	50056
1	Air Compressor	Worthington Co.	350352	50057
1	Transformer	Larkin Lectos Products		
1	Transformer	Larkin Lectos Products		
1	Transformer	Larkin Lectos Products		

Amended Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

Plaintiffs suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, by their attorneys, Samuel L. Chess and Fischer & Fischer, and Perlman, Goodman, Hecht & Ches-

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ler, for their amended complaint herein respectfully show and allege upon information and belief, except as to paragraph "1", which is alleged on personal knowledge:

For a first cause of action against defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay B. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation and Kaiser-Frazer Corporation:

1. Plaintiffs are stockholders of Kaiser-Frazer corporation. Plaintiff Jerome R. Pergament, a resident of the County, City and State of New York, has been such stockholder continuously since December, 1947. Plaintiff George J. London, a resident of Jersey City, New Jersey, has been such stockholder continuously since October, 1945.

2. Defendant Kaiser-Frazer Corporation* is and at all times hereinafter mentioned was a corporation** duly organized and existing under and by virtue of the laws of the State of Nevada. It was organized on or about August 9, 1945. Since that time it has engaged and does now engage in the production, distribution and sale of passenger automobiles and replacement parts thereof and has engaged and does now engage in said business directly and through wholly owned subsidiaries at Willow Run, Detroit and Dowagiac, in the State of Michigan, and in the County, City and State of New York.

3. Defendant Graham-Paige Motors Corporation† is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the

* Hereinafter referred to as "Kaiser-Frazer".

** Attached are further amendments pursuant to Court order dated December 20, 1948, and filed January 12, 1949.

† Hereinafter referred to as "Graham-Paige".

laws of the State of Michigan. At the present time it is engaged in the manufacture, distribution and sale of farm equipment. At the times mentioned herein and until in or about the month of February, 1947 it was also engaged in the manufacture, distribution and sale of automobiles. At all times mentioned herein it had and now has offices for the transaction of its business in the City of Detroit, Michigan, and in the County, City and State of New York.

4. Defendants Joseph W. Frazer, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr. reside in the City of Willow Run, State of Michigan. Defendants Henry J. Kaiser, G. G. Sherwood and E. E. Trefethen, Jr. reside in the City of Oakland, State of California.

5. The principal plant of defendant Kaiser-Frazer located at Willow Run, Michigan, was leased from the Reconstruction Finance Corporation under a lease dated November 1, 1945. From about that date until the month of February, 1947 said plant was operated by defendant Kaiser-Fraser and defendant Graham-Paige pursuant to a joint operating agreement entered into on September 20, 1945 and thereafter supplemented and amended, under which agreement said defendants had the right to use the productive capacity and facilities of the plant for the manufacture and production of automobiles in the following proportions: Kaiser-Frazer had the right to use up to 66⅔% of the productive capacity and facilities and Graham-Paige had the right to use up to 33⅓% of the productive capacity and facilities. The two corporations generally adhered to such percentage and defendant Kaiser-Frazer and defendant Graham-Paige had borne respectively approximately two-thirds and one-third of the total cost of operations at said Willow Run plant.

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6. In or about October, 1946 forecasts made on behalf of Graham-Paige showed that it would not be able to continue to finance the utilization of one-third of the productive capacity at the Willow Run plant unless it were to secure a minimum of $5,000,000 additional financing. Graham-Paige endeavored to secure such financing, but was unable to do so. Accordingly, as of December 1, 1946 it made an agreement with defendant Kaiser-Frazer under which the latter was to manufacture at the Willow Run plant automobiles on behalf of Graham-Paige, and under which it was agreed that after February 1, 1947 the productive capacity and facilities of the Willow Run plant only up to 12½% was to be utilized in connection with the production of automobiles for Graham-Paige. Said agreement was described as an Interim Agreement.

7. Thereafter and as of December 12, 1946 a further agreement was made between defendants Kaiser-Frazer and Graham-Paige, which provided in substance that Graham-Paige would sell and transfer to Kaiser-Frazer its automotive assets—principally tooling and equipment at the Willow Run plant—which, together with a cash payment of $3,000,000, was "estimated" as having a value of approximately $10,600,000, and that in exchange therefor Kaiser-Frazer should undertake to pay the principal of, interest on and expenses incidental to 4% Convertible Debentures due April 1, 1956 of Graham-Paige in the principal amount of $8,524,000; to issue to Graham-Paige 750,000 shares of Kaiser-Frazer common stock; and to assume all the liabilities of Graham-Paige and its subsidiaries which arose out of the automobile business of Graham-Paige at Willow Run. For the purpose of said transaction, which was consummated under date of February 10, 1947, defendant Kaiser-Frazer valued the aforesaid 750,000 shares at $6.50 per share and at said valuation computed that it was paying approximately $2,715,000 in excess of the fair value of the

assets received from Graham-Paige, which said excess it allocated to so-called "intangible rights" which were allegedly being acquired from said Graham-Paige, including Graham-Paige's purported right to one-third of the production capacity of the Willow Run plant.

8. In truth and in fact the value of the aforesaid so-called "intangible rights" acquired from Graham-Paige were non-existent or negligible. Under the prior Interim Agreement dated as of December 1, 1946, referred to hereinabove, Graham-Paige's rights in and to the production capacity of the Willow Run plant had been reduced to 12½% thereof, and said Interim Agreement and the aforesaid agreement dated as of December 12, 1946 were made for the purpose, in part, of limiting and then eliminating the losses which Graham-Paige had continuously sustained through its operations at the said Willow Run plant. Moreover, when the aforesaid agreement of December 12, 1946 was made the Kaiser-Frazer stock had a market value of $8.12½ per share and a book value of approximately $10 per share and the real, true and intrinsic value of the aforesaid 750,000 shares of Kaiser-Frazer stock issued by defendant Kaiser-Frazer to defendant Graham-Paige was approximately $2,500,000 in excess of the value assigned to said stock by Kaiser-Frazer for the purposes of the transaction. In addition, by undertaking to pay not only the principal of the aforesaid Graham-Paige Convertible Debentures, but also the interest thereon and the incidental expenses in connection therewith, defendant Kaiser-Frazer was undertaking additional obligations running into millions of dollars. The payments made and obligations assumed by defendant Kaiser-Frazer in connection with the aforesaid transaction, accordingly, were not merely $2,715,000 in excess of the "estimated" value of the assets received from Graham-Paige but were in the neighborhood of from $6,000,000 to $8,000,000 in excess thereof.

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9. The purpose, object and effect of the aforesaid transaction was not alone to cause defendant Kaiser-Frazer to pay an exorbitant sum for the assets acquired from Graham-Paige, but was to enable said defendant Graham-Paige and also defendants Joseph W. Frazer and Henry J. Kaiser to profit therefrom and at the same time to assure the continuance of the control exercised by said defendants over the affairs of defendant Kaiser-Frazer. Defendant Joseph W. Frazer had and has a substantial stock interest in Graham-Paige. As the result of the aforesaid transaction and the issuance to Graham-Paige of the aforesaid 750,000 shares, Graham-Paige increased its holdings from 250,000 shares to 1,000,000 shares of Kaiser-Frazer stock, then constituting 21.05% of the outstanding stock of Kaiser-Frazer. Thereafter and in or about August of 1947 defendant Graham-Paige sold 100,000 shares of its Kaiser-Frazer stock to The Permanente Metals Corporation of which defendant Henry J. Kaiser is an officer, director and substantial stockholder at a price of $6.75 per share. Approximately 570,000 shares of Kaiser-Frazer stock owned by Graham-Paige remained in a voting trust, made on or about February 10, 1947, which gives to Joseph W. Frazer and Henry J. Kaiser, the voting trustees, control thereof. The disposition of the Kaiser-Frazer stock issued to Graham-Paige pursuant to the aforesaid transaction, as aforesaid, and the objects to be accomplished thereby, as herein alleged, were in contemplation of the parties at the time of the aforesaid transaction between Kaiser-Frazer and Graham-Paige.

10. At the time of the aforesaid transaction between defendants Kaiser-Frazer and Graham-Paige the following defendants were and still are directors and officers of Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr. Moreover, at the time of said transaction a majority of said directors, namely, Joseph W. Frazer,

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Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr., were also directors and/or officers of Graham-Paige. Defendant Joseph W. Frazer was at said time and still is President of Kaiser-Frazer and also President and Chairman of the Board of Graham-Paige. All said defendants authorized and approved the aforesaid transaction between Kaiser-Frazer and Graham-Paige and in so doing acted negligently, wrongfully and fraudulently and in violation of their fiduciary duties to Kaiser-Frazer and to its damage in sums running into many millions of dollars; as aforesaid, and to and for the benefit of defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser and all said defendants, including defendant Graham-Paige, acted in wrongful and fraudulent concert and conspiracy to effect said transaction with and for the purpose of enriching defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser at the expense of defendant Kaiser-Frazer, and the aforesaid transaction has had that effect.

11. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute an action on behalf of Kaiser-Frazer for the relief sought herein because the said officers and directors of Kaiser-Frazer are responsible for the aforesaid transaction between defendant Kaiser-Frazer and defendant Graham-Paige and are liable therefor to defendant Kaiser-Frazer. They were parties to the plan and conspiracy to benefit and enrich defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser at the expense of defendant Kaiser-Frazer; they (except for one Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

12. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

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13. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

14. Plaintiffs have no adequate remedy at law.

For a Second Cause of Action against defendants Joseph W. Frazer, Henry J. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Otis & Co., Cyrus Eaton and Kaiser-Frazer Corporation:

15. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" and "2" hereinabove as though herein set forth at length.

16. Plaintiffs repeat and reallege each and every allegation set forth in paragraph "4" hereinabove as though herein set forth at length and further allege that defendant Cyrus Eaton resides in the City of Northfield, State of Ohio.

17. Defendant Otis & Co. is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at such times had and still has offices for the transaction of business in the County, City and State of New York and in the City of Detroit, Michigan. Defendant Cyrus Eaton is and at all times hereinafter mentioned was a director, officer and one of the principal stockholders of said defendant Otis & Co.

18. Prior to February 3, 1948 defendant Kaiser-Frazer contemplated a public issue of 1,500,000 shares of the common stock of said Kaiser-Frazer at a price to the public of $13 per share, and in that connection arrangements had been made with defendant Otis & Co. and with

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First California Company and Allen & Company as underwriters under which said underwriters were to acquire such shares under a firm commitment at a price to yield to defendant Kaiser-Frazer $11.50 per share and to yield to said underwriters, when and if they disposed of said stock, underwriting discounts and commissions in the amount of $1.50 per share. It was contemplated by the parties that the stock would be offered to the public on February 4, 1948 and that the underwriting agreement would be signed prior thereto.

19. On or prior to February 2, 1948 defendants Otis & Co. and Cyrus Eaton advised the officers and directors of Kaiser-Frazer that the proposed underwriting agreement would be executed by the underwriters if and only if defendant Kaiser-Frazer undertook during the day of February 3, 1948 to "stabilize" the market in the stock of Kaiser-Frazer at $13.50 per share, and advised the officers and directors of Kaiser-Frazer that such "stabilization" operations would involve the acquisition by Kaiser-Frazer of no more than 25,000 shares of its stock on the market. Said defendants, moreover, undertook to conduct said stabilization operations on behalf of defendant Kaiser-Frazer. Arrangements were made, accordingly, that such "stabilization" operations be conducted on February 3 through the acquisition by defendant Kaiser-Frazer of its own stock on the market so as to maintain a market price of $13.50 per share, and that such operations be conducted by defendants Eaton and Otis & Co. on behalf of defendant Kaiser-Frazer.

20. During the course of the following day, namely, February 3, 1948, said "stabilization" operations were conducted as per the aforesaid arrangements, but it soon became apparent that such operations would necessitate the acquisition by defendant Kaiser-Frazer of increasingly

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larger numbers of its own shares on the market and, accordingly, defendants Eaton and Otis & Co. advised the acquisition of increasingly large numbers of shares and obtained the authorization from the officers and directors of Kaiser-Frazer to acquire such shares on behalf of defendant Kaiser-Frazer. By the end of said day, namely, February 3, 1948, there had been acquired in pursuance of said "stabilization" operations by and on behalf of defendant Kaiser-Frazer a total of 186,200 shares of the stock of defendant Kaiser-Frazer at a cost to defendant Kaiser-Frazer in the neighborhood of $2,500,000.

21. Said "stabilization" operations were in truth and in fact conducted for the purpose of inducing the purchase by the public of the stock proposed to be offered by defendant Kaiser-Frazer, were for the purpose and had the effect of creating an artificial market in the stock of said defendant Kaiser-Frazer, and were conducted in such manner and by such means as to peg or rig the price of said stock on the national securities exchanges, the facilities of which were used by the public for the sale and acquisition of said stock and were conducted in such manner as to violate various provisions of Sections 9, 10 and 17 of the Securities Exchange Act of 1934 and the rules promulgated in pursuance thereof. Moreover, defendants in causing defendant Kaiser-Frazer to make such substantial acquisitions of its own stock on the market for the purposes and with the effect aforesaid, knew or should have known that their conduct was improper and unlawful and that they were jeopardizing the interests of defendant Kaiser-Frazer, particularly inasmuch as the stock thus acquired was worth substantially less than the price paid therefor.

22. On said date, namely, February 3, 1948, defendants Eaton and Otis & Co., anticipating difficulty in the disposition of the 1,500,000 shares of stock which it had been arranged that the underwriters were to acquire from

defendant Kaiser-Frazer for sale to the public, and believing that their conduct as herein set forth might facilitate the disposition of such stock, wrongfully and fraudulently notified many persons, firms and corporations of the aforesaid "stabilization" operations being conducted on behalf of defendant Kaiser-Frazer, and advised and counseled them then and there and on that day to dispose of such stock of Kaiser-Frazer as they had on the market which was being pegged at $13.50 per share, and advised and counseled them that on the following day, when the underwriters offered the stock to the public, they would be able to acquire such stock at $13.00 per share and thereby make a profit for themselves. Such wrongful, fraudulent and clandestine advice and counsel to such persons, firms and corporations accounted for the great activity in the market of the stock of defendant Kaiser-Frazer, and accounted for the necessity on the part of Kaiser-Frazer to acquire such large block of stock, as aforesaid, in its "stabilization" operations.

23. Thereafter, on February 3, 1948, and after the close of the market, defendants Eaton and Otis & Co. advised the officers and directors of defendant Kaiser-Frazer that the underwriters were unwilling to sign the agreement calling for their acquisition of 1,500,000 shares of the stock of Kaiser-Frazer and, accordingly, arrangements were then made to modify said agreement so as to require said underwriters to acquire 900,000 shares of stock under a firm commitment giving them the option to acquire the additional 600,000 shares of stock under what was described as a "best efforts" deal, i.e., that they were to use their best efforts to dispose of the additional 600,000 shares of stock, but if they were unable to do so they would not be required to acquire same. Said agreement as so modified was thereupon and on said day, namely, February 3, 1948, signed by the Underwriters and by defendant Kaiser-Frazer. In

truth and in fact the said underwriters, including the defendant Otis & Co., were at that time, and by reason of the circumstances hereinabove related, estopped both in fact and in law from refusing to sign the original agreement calling for their acquisition of 1,500,000 shares of the common stock of defendant Kaiser-Frazer, and in making the aforesaid compromise arrangement the officers and directors of defendant Kaiser-Frazer acted negligently and in disregard of the best interests of defendant Kaiser-Frazer but under duress practiced upon them by defendants Eaton and Otis & Co.

24. On the following day, namely, February 4, 1948, and on the days following that date, the underwriters, particularly Otis & Co., found it impossible to dispose of the shares which they had agreed to acquire from defendant Kaiser-Frazer, and said defendant Otis & Co. importuned the officers and directors of defendant Kaiser-Frazer to relieve the underwriters of their commitments, but the directors and officers of Kaiser-Frazer were unwilling to do so. The underwriting agreement, which provided for the closing on February 9, 1948, provided also in substance that on or prior to the closing an opinion should be received from counsel for Kaiser-Frazer in form and substance satisfactory to counsel for Otis & Co., to the effect that except as set forth in the prospectus filed with the Securities and Exchange Commission covering the shares to be sold by the underwriters, there was not to the knowledge of counsel any material pending legal proceedings required to be set forth in the prospectus to which Kaiser-Frazer was a party and that no such proceedings were contemplated. In an effort to relieve itself of its underwriting commitment said defendant Otis & Co., wrongfully and fraudulently caused to be instituted in the Circuit Court for the County of Wayne, State of Michigan, in Chancery, an action entitled "James F. Masterson, Plaintiff, *vs.* Kaiser-Frazer Cor-

poration, *et al.*, Defendants", the complaint in said action being filed on the morning of February 9, 1948. Defendant Otis & Co., using the filing of said complaint as a pretext, refused to consummate the underwriting agreement and induced one of its co-underwriters, namely, First California Company, similarly to refuse to consummate said underwriting agreement.

25. At the times hereinabove mentioned the following defendants were directors and officers of defendant Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, and Hickman Price, Jr. Said defendants and one Walston S. Brown were the officers and directors acting for and on behalf of defendant Kaiser-Frazer in the aforesaid transactions.

26. In the aforesaid transactions the directors and officers of defendant Kaiser-Frazer, all of whom except for Walston S. Brown are defendants herein, acted negligently, wrongfully and unlawfully in that they caused Kaiser-Frazer to embark upon the so-called "stabilization" operations which were in fact in violation of the Securities Exchange Act of 1934, and in causing said defendant Kaiser-Frazer to acquire its own stock not only at a price far in excess of the value thereof, but at a time when it could ill afford the loss of the use in its business operations of the $2,500,000 which said acquisition entailed; in that they undertook such "stabilization" operations in advance of a written agreement with the underwriters committing them to the purchase from defendant Kaiser-Frazer of 1,500,000 shares of stock upon the terms as arranged; and in that they permitted themselves to be induced to modify said underwriting arrangement after the conduct of said so-called "stabilization" operations, as aforesaid. In the aforesaid transactions the defendants Eaton and Otis & Co.

acted wrongfully, unlawfully and fraudulently in that they induced defendant Kaiser-Frazer to conduct the aforesaid unlawful so-called "stabilization" operations, and actually conducted said operations on behalf of said defendant Kaiser-Frazer; in that while said so-called "stabilization" operations were being conducted they advised and counseled various persons, firms and corporations to dispose of their holdings of stock of Kaiser-Frazer, as aforesaid; in that after said so-called "stabilization" operations had been conducted they wrongfully failed and refused to sign the agreement calling for a commitment on the part of the underwriters to acquire the 1,500,000 shares of stock of defendant Kaiser-Frazer, as aforesaid, and by duress practiced on the officers and directors of defendant Kaiser-Frazer Corporation induced the aforesaid modification of said agreement; and in that they wrongfully inspired and caused to be commenced the aforesaid Masterson action and used same as a pretext for failing to abide by the modified underwriting agreement, and also caused one of its co-underwriters, namely, First California Company, to similarly refuse to abide by said modified underwriting agreement. The aforesaid conduct by all the said defendants has resulted in serious damage to defendant Kaiser-Frazer Corporation, both direct and consequential, in an amount unknown to these plaintiffs, but believed to be in excess of $15,000,000. Such damages embrace, amongst other things, the losses to defendant Kaiser-Frazer Corporation resulting from its expenditure of $2,500,000 in acquiring its own stock at a price in excess of the value thereof and resulting in its inability to use said funds in the normal operations of its business at a time when such funds were necessary to such operations; the loss of profits by defendant Kaiser-Frazer entailed by the deterioration of its good will resulting from the aforesaid machinations of the defendants; the losses to defendant Kaiser-Frazer entailed by the refusal of defendants Eaton and Otis & Co. to abide by the original

underwriting arrangements, pursuant to which the underwriters were to acquire from defendant Kaiser-Frazer and pay for 1,500,000 shares of the stock of Kaiser-Frazer; and the failure and refusal, upon the pretext of the Masterson suit, to comply even with the modified underwriting agreement.

27. Defendant Kaiser-Frazer has as a plaintiff instituted an action against Otis & Co. in the Supreme Court of the State of New York, which action has been removed to the United States District Court for the Southern District of New York, in which it seeks to require Otis & Co. to abide by the modified underwriting agreement and in which it seeks also damages from said defendant Otis & Co. for inducing First California Company to repudiate its obligations under the modified underwriting agreement. The said action, which is extremely limited in scope, does not seek the relief sought on behalf of defendant Kaiser-Frazer by the plaintiffs herein for the reason that the officers and directors of defendant Kaiser-Frazer, defendants herein, are involved and are implicated in the wrongful conduct hereinabove alleged resulting in damage to defendant Kaiser-Frazer far in excess of that sought by the complaint in the aforesaid action and for which, as aforesaid, said officers and directors of defendant Kaiser-Frazer are liable along with defendants Eaton and Otis & Co.

28. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute action on behalf of Kaiser-Frazer for the relief sought herein, because the said officers and directors of Kaiser-Frazer are involved and implicated in and are responsible for the aforesaid transactions and are liable therefor to defendant Kaiser-Frazer. In connection with the aforesaid transactions they acted negligently, wrongfully and unlawfully to the damage of defendant Kaiser-Frazer Corpora-

tion, as aforesaid; they (except for Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

29. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

30. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

31. Plaintiffs have no adequate remedy at law.

For a third cause of action against defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation:

32. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs "1", "2" and "4" hereinabove as though herein set forth at length.

33. Defendant, The Permanente Metals Corporation (hereinafter referred to as "Permanente Metals") is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. Since its organization in 1940 (under the name of Todd-California Shipbuilding Corporation), it had engaged primarily in shipbuilding activities and the production of primary magnesium. Following the war last past, it discontinued these activities, and thereafter and in 1946, under circumstances more fully set forth

hereinafter, it commenced engaging, and still engages, in the production of primary aluminum, and the sale of aluminum and aluminum products, mainly in the form of sheet. At all times mentioned herein, it has engaged and still engages in business in the City of Detroit, Michigan, by and through its duly authorized agents, representatives, and its subsidiary corporation, Permanente Products Company, and it had and now has offices for the transaction of its business in the City of Detroit, Michigan, and in the City of Oakland, California.

34. Defendant, Permanente Products Company (hereinafter referred to as "Permanente Products"), is and at all times hereinafter mentioned was a corporation duly organized and existing und · and by virtue of the laws of the State of California. At all such times, it was and still is a wholly owned subsidiary of defendant, Permanente Metals, its affairs and policies are controlled and directed by Permanente Metals, it was and is the agency and instrumentality through and by which defendant, Permanente Metals, makes the substantial part of its aluminum sales, and its affairs and activities were and are in fact integrated with and into those of defendant Permanente Metals. At present, about 75% of the aluminum sales made by Permanente Metals are made by the sales organization of Permanente Products (the balance being made either directly by Permanente Metals or through distributors). At all times mentioned herein, Permanente Products was and is duly authorized to transact business in the state of Michigan and had and now has offices for the transaction of its business in the City of Detroit, Michigan.

35. At all times hereinafter mentioned, defendant, Henry J. Kaiser and various of his business associates, owned and continue to own substantial interests in companies which owned and continued to own until the early

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part of July, 1948, (when there was a public issue of stock of Permanente Metals) about 65% of the capital stock of Permanente Metals.

Henry J. Kaiser Company owned 27.01% of said capital stock; the stock of Henry J. Kaiser Company in turn is owned 50% (carrying 66⅔% of the voting rights) by defendant, Henry J. Kaiser, 25% by a son of said defendant, defendant Edgar F. Kaiser, and 25% by a Trustee under a trust of which another son of said defendant, Henry J. Kaiser, Jr., is a beneficiary. The Kaiser Company also owned 27.01% of said capital stock of Permanente Metals; the stock of The Kaiser Company in turn is owned 20% by defendant, Edgar F. Kaiser, 20% by the aforesaid trust of which Henry J. Kaiser, Jr., is beneficiary, 6% by defendant, Henry J. Kaiser, and the remaining 54% is divided among seven business associates of defendant, Henry J. Kaiser. Kaiser Engineers, Inc., owned 10.63% of said capital stock of Permanente Metals; the stock of Kaiser Engineers, Inc., is owned 40% by Henry J. Kaiser Company, the rest being divided equally by twelve business associates of defendant, Henry J. Kaiser. Through the aforesaid stock ownerships by himself and his sons and otherwise, defendant, Henry J. Kaiser, has dominated and controlled the various aforesaid "Kaiser" Companies and through them has dominated and controlled Permanente Metals and Permanente Products.

36. In and prior to May, 1946, and since said date, the following defendants have been directors and officers of defendant, Kaiser-Frazer: Henry J. Kaiser (Board Chairman), Joseph W. Frazer, Edgar F. Kaiser (Vice-President and General Manager), G. G. Sherwood (Treasurer and Assistant Secretary), E. E. Trefethen, Jr. (Vice-President and Assistant Secretary), Clay P. Bedford (Vice-President), W. A. MacDonald (Vice-President), O. B. Motter (Vice-President), Hickman Price, Jr. (Vice-President). At

said times, but prior to the month of September, 1946, one H. C. McCaslin was also a director of Kaiser-Frazer; he resigned in September, 1946, and was then succeeded by one Walston S. Brown, who has since been a director (and the Secretary) of Kaiser-Frazer.

37. In and prior to May, 1946, and since said date, the following defendants—directors of Kaiser-Frazer, as aforesaid—have also been directors and officers of Permanente Metals: Henry J. Kaiser (President), Edgar F. Kaiser (Vice-President—not director), E. E. Trefethen, Jr. (Executive Vice-President), and G. G. Sherwood (Vice-President, Secretary and Treasurer). During said period, said persons, and also some of the other directors of Permanente Metals (of whom there are five additional) have occupied similar capacities with Permanente Products. The majority of the directors of Permanente Metals, and in particular the aforementioned defendants who have also been directors of Kaiser-Frazer, have at all said times owned stock in various of the aforesaid "Kaiser" Companies, have held official positions (as officers and directors) in said "Kaiser" Companies, and are included amongst the aforesaid "business associates" of Henry J. Kaiser.

38. In or prior to the year 1946, and in any event prior to the 10th day of May, 1946, Kaiser-Frazer obtained from the War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser-Frazer the Trentwood rolling mill, located at Trentwood, Washington, on the Spokane River. Said plant, built in 1942 and 1943, is on land comprising about 525 acres, and the plant buildings, including office space, have a floor area of approximately 2,250,000 square feet, and are of permanent construction. The plant has facilities for the production of sheet, plate and strip from pig and scrap aluminum; and is also equipped to produce aluminum corrugated roofing,

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clapboard siding, screening and circular blanks. It has a rated production capacity of 288,000,000 pounds per annum of sheet, plate and strip.

Said letter agreement contemplated a lease to expire on December 31, 1949, with the option in Kaiser-Frazer to extend the term to July 1, 1953, and, if exercised, the further options to extend the term to July 1, 1963; it being further contemplated that if the option to extend the term to July 1, 1953 was exercised, the lessee had the further option to terminate the lease at the end of either 1950 or 1951, on one year's notice.

39. Thereafter, by agreement dated May 10, 1946, the defendants herein caused Kaiser-Frazer to assign to Permanente Metals all its rights under the aforesaid letter agreement, and the only consideration given for said assignment was the assumption by Permanente Metals of Kaiser-Frazer's obligations under the agreement, and the further agreement by Permanente Metals to supply Kaiser-Frazer with aluminum sheet—within specified limits—in the event Kaiser-Frazer should require such sheet, said latter agreement to expire in any event on July 1, 1953. Permanente Metals obtained the lease on the Trentwood rolling mill and thereupon and in July, 1946, became one of the three producers in the United States of primary aluminum.

From July 1, 1946 to May 31, 1947, Permanente Metals in part directly, but primarily through Permanente Products, made gross sales (in dollars) of products from the Trentwood plant in an amount totalling $43,486,000, as against gross sales of products from its other plants in the amount of $742,000. From June 1, 1947 to May 31, 1948, the analogous figures are $58,520,000 for the Trentwood plant, and $3,762,000 for the other plants of Permanente Metals.

The gross profits of Permanente Metals from the sale of aluminum products, constituting in excess of 95% of its gross profits from all sources, and due almost entirely to sales of products from the Trentwood plant, were $12,310,149 for the year ended May 31, 1947, and were $18,533,832 for the year ended May 31, 1948. Permanente Metals' net income (before provision for Federal Income Tax), for the year ended May 31, 1947 was $8,635,684 and for the year ended May 31, 1948 was $15,101,338.

Said profits were earned by Permanente Metals after the payment of substantial sums to various of the "Kaiser" Companies, e. g., the payment to Kaiser Services, the stock of which is wholly owned by Henry J. Kaiser Company, of the sum of $397,982, for "management" services, for the year ended May 31, 1948; the payment to Henry J. Kaiser Company of the sum of $70,307 for "office rental" and other charges for the same period; the payment to Kaiser Company, Inc., the stock of which is owned by Henry J. Kaiser, Edgar F. Kaiser and their associates, of the sum of $32,127 for "use of sales offices" etc., for the same period; and the payment to Kaiser Engineers, Inc., of the sum of $76,507 for "engineering" and other services for the same period.

40. At the time of the assignment of the aforesaid letter agreement between Kaiser-Frazer and the War Assets Administration to Permanente Metals, the directors of Kaiser-Frazer, defendants herein, should have known and knew that: Said agreement and the lease contemplated thereby created the opportunity for very substantial profits; Kaiser-Frazer had, on the basis of its own credit and financial standing, and through its own facilities expenditures and resources, obtained said letter agreement for Kaiser-Frazer; said Kaiser-Frazer had or could have obtained all the facilities and services necessary to exploit said opportunity in the same manner and to the same extent, at least, as those facilities were possessed by or obtained by Permanente Metals; in the then circumstances and on the basis of proper analyses, then available and obtainable, the Trent-

wood enterprise was assured of substantial profits; and, had the assignment not been made, Kaiser-Frazer could and would have realized substantial profits from the Trentwood plant.

In causing Kaiser-Frazer to make said assignment, defendants, directors and officers of Kaiser-Frazer, acted with gross negligence, with reckless indifference to the rights and interests of Kaiser-Frazer, and in violation of their fiduciary duties to Kaiser-Frazer; the purported consideration therefor was negligible and of no real value. In effectuating said transaction, the directors and officers of Kaiser-Frazer acted in wrongful and fraudulent conspiracy with and under the domination of the aforesaid common directors and officers of Kaiser-Frazer and Permanente Metals, and in wrongful and fraudulent conspiracy with Permanente Metals, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser Companies which had the majority stock interest in Permanente Metals, the aforesaid common directors and other business associates of the Kaisers. The said transaction and the resultant substantial profits to Permanente Metals, directly, and to the others, and particularly the Kaiser interests, indirectly, were made possible and effectuated through the use of the credit, facilities, expenditures and resources, of Kaiser-Frazer and the diversion from it of the opportunity which it had of making profits, which were substantial and assured. Said transaction was wrongful and fraudulent as to Kaiser-Frazer, the asset improperly diverted from it was unique and irreplaceable, and the profits of which it was improperly deprived were substantial and running into tens of millions of dollars.

41. By reason of the premises Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds its aforesaid lease on the Trentwood

plant in trust for Kaiser-Frazer; that the said lease be assigned, transferred and set over to and for the benefit of Kaiser-Frazer; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operation of the Trentwood plant, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser" Companies, as aforesaid; and that all defendants similarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transaction herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned subsidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits, herein requested, will be facilitated thereby.

War Assets Administration is an agency of the United States of America, the latter being named a defendant herein on its behalf. Reconstruction Finance Corporation is a corporation created by Act of Congress and is also named herein as a defendant. Said defendants have offices for the transaction of business in the City of Detroit, Michigan and are named party defendants herein, because the original letter agreement involving the Trentwood plant, as aforesaid was made by said War Assets Administration, and it (or the United States of America) is the lessor under the lease of said Trentwood plant and because Reconstruction Finance Corporation is or may similarly be a party to said lease. No claim whatsoever is made against either of said defendants, except that they honor and consent to such decree as may be made by this Court

directing the assignment of the said lease by Permanente Metals to Kaiser-Frazer, if, under the circumstances, such consent may be deemed either proper or necessary. Any reference otherwise herein, in this cause of action, made to "defendants" in general terms is not to be taken as including either United States of America (War Assets Administration) or Reconstruction Finance Corporation.

42. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute an action on behalf of Kaiser-Frazer for the relief sought herein because the said officers and directors, with the single exception of Walston S. Brown, were directors and officers of Kaiser-Frazer at the time of the transaction complained of herein, are responsible for said transaction and are liable therefor to defendant, Kaiser-Frazer. They were parties to the plan and conspiracy to benefit and enrich defendant, Permanente Metals, directly, and the various "Kaiser" Companies, the Kaisers and their business associates, as aforesaid, indirectly; they are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

The futility of such demand, moreover, is further indicated by the following facts:

On or about June 21, 1948, Otis & Co. (a defendant in the second cause of action contained herein), as a stockholder of Kaiser-Frazer, and as one of the underwriters of issues of its stock sold to the public, in a telegram addressed to Kaiser-Frazer and its directors and officers, advised the latter that it considered the assignment from Kaiser-Frazer to Permanente Metals of the aforesaid letter agreement with War Assets Administration deprived Kaiser-Frazer of a valuable asset in exchange for an inadequate consideration, that such transfer was in violation of the fiduciary duties of said directors and officers to Kaiser-Frazer, and was a fraud upon Kaiser-Frazer

and its stockholders; and in said telegram, demand was made that the Trentwood plant and the aforesaid lease thereon be restored to Kaiser-Frazer, and that Permanente Metals and other defendants herein, particularly Henry J. Kaiser and Edgar F. Kaiser, account to Kaiser-Frazer for profits wrongfully obtained by them as a result of such transfer. On or about June 22, 1948, said Otis & Co. sent a further telegram to the directors of Kaiser-Frazer demanding that appropriate action be taken in the premises to restore the Trentwood plant to Kaiser-Frazer, and for an appropriate accounting.

On or about June 25, 1948, the directors of Kaiser-Frazer, including Walston S. Brown, at a meeting duly convened and held rejected the aforesaid demand that legal action be instituted upon the pretext that its reconsideration of the facts did not disclose any facts indicating that the transaction was not in the best interests of Kaiser-Frazer. In view of the facts, hereinabove alleged, the said refusal of the directors of Kaiser-Frazer to institute appropirate action on its behalf was due to inexcusable neglect on their part and reckless indifference to the welfare of said Kaiser-Frazer. Moreover, the Board, in so refusing to institute appropriate proceedings, was subject to and subjected to improper control and domination by the defendants Kaiser. Moreover, as aforesaid, the said directors (with the possible exception of Waltson S. Brown) were not in a position to exercise a fair, honest and independent judgment inasmuch as they themselves were parties to the aforesaid plan and conspiracy, and are liable for the consequences thereof, as hereinabove alleged.

43. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

44. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

Exhibit 1. Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

45. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray for judgment as follows:

(a) That defendants and each of them other than defendant Kaiser-Frazer Corporation account for their acts and conduct as directors and officers of said defendant Kaiser-Frazer Corporation and as conspirators in respect of and participants in said acts and conduct, and that they be directed to account for all moneys, assets, facilities and property of said defendant Kaiser-Frazer Corporation which were negligently, wrongfully, unlawfully and fraudulently wasted, diverted, misapplied, misappropriated and lost, and that they be directed to pay over and to restore to said defendant Kaiser-Frazer Corporation any and all sums of money thus accounted for;

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation holds the aforesaid lease on the Trentwood plant in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said lease to and for the benefit of defendant, Kaiser-Frazer Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of the Trentwood plant, and the sale of products manufactured thereat;

(c) That defendants and each of them other than defendant Kaiser-Frazer Corporation be directed to account for all secret gains, profits, advantages and benefits received by them, or any of them, directly or indirectly, through the wrongful, improper and illegal use of the moneys, assets, facilities and property of defendant Kaiser-Frazer Corporation and that they be directed to repay,

restore and pay over all such moneys and properties so acquired or the value thereof;

(d) That defendants and each of them, other than defendant Kaiser-Frazer Corporation, account to said defendant Kaiser-Frazer Corporation, for their acts and conduct herein complained of, and that they be directed to pay over and restore to said defendant Kaiser-Frazer Corporation all losses occasioned by their acts and conduct, and all profits or gains realized by them by said acts and conduct;

(e) That plaintiffs be given such other and further relief as may be just and proper in the premises, together with the costs and disbursements of this action.

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Attorneys for Plaintiffs.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

JEROME R. PERGAMENT.

JEROME R. PERGAMENT.

Sworn to before me, this }
22nd day of July, 1948. }

MARTIN M. CHESS

MARTIN M. CHESS
Commissioner of Deeds N. Y. City
N. Y. Co. Clk's No. 8 Reg. No. 0-C-43
Bronx Co. Clk's No. 2 Reg. No. 0-C-17
Kings Co. Clk's No. 26 Reg. No. 50-C-31
Commission Expires Jan. 27, 1950

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GEORGE J. LONDON.

GEORGE J. LONDON.

Sworn to before me, this }
22nd July, 1948. }

EDWARD J. SCANLON
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Amendments to Amended Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT, *et al.*, Plaintiffs, *vs.* JOSEPH W. FRAZER, *et al.*, Defendants.	Civil Action. No. 7354.

Paragraph 1 of the Amended Complaint is hereby amended to read as follows:

"1. Plaintiffs are stockholders of Kaiser-Frazer Corporation. Plaintiff Jerome R. Pergament, is and has been since some time prior to the commencement of this action, a resident of the County, City and State of New York, and a citizen of the State of New York, and plaintiff George J. London, is and has been since some time prior to the commencement of this action, a resident of Jersey City, County of Hudson and State of New Jersey, and a citizen of the State of New Jersey. Plaintiff George J. London acquired shares of common stock of Kaiser-Frazer Corporation on or about October 22nd, 1945, and has been such stockholder, holding and owning said shares of stock continuously since said date, and was such stockholder at the time of all of the transactions

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

complained of in the Amended Complaint. Plaintiff Jerome R. Pergament acquired shares of the common stock of Kaiser-Frazer Corporation by purchase, and as an investment, on or about the 2nd day of December, 1947, acquiring said shares in good faith, without knowledge of such of the transactions complained of in the Amended Complaint as occurred prior to his purchase of said shares, the said Jerome R. Pergament having no intent at the time of the acquisition of said shares to institute litigation in connection with any of the acts and transactions complained of in the Amended Complaint.

"Jurisdiction of this court depends and is sustainable upon the ground of diversity of citizenship."

Paragraph 15 of said Amended Complaint is amended to read as follows:

"15. Plaintiffs repeat and reallege each and every allegation set forth in Paragraph 1, as hereby amended, and Paragraph 2 of the Amended Complaint, as though herein set forth at length."

Paragraph 32 of said Amended Complaint is amended to read as follows:

"32. Plaintiffs repeat and reallege each and every allegation set forth in Paragraph 1 of the Amended Complaint, as hereby amended, and Paragraphs 2 and 4 of said Amended Complaint, as though herein set forth at length."

JEROME R. PERGAMENT
GEORGE J. LONDON

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the above named plaintiffs herein; that he has read and knows the contents of the Amended Complaint and each of the causes of action therein alleged and of the foregoing amendments to the Amended Complaint; that said Amended Complaint is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to such matters, he believes it to be true; that the amendments to the Amended Complaint, insofar as the same relate specifically to him, are true of his own knowledge.

JEROME R. PERGAMENT

Subscribed and sworn to before me
this 6th day of January, 1949.

DAVID ARONOWITZ
Notary Public, State of New York
Residing in Kings Co. No. 70, Reg. No. 304-A-O
Certificate filed in N. Y. Co. No. 170, Reg. No. 454-A-O
Commission Expires March 30, 1950.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the above named plaintiffs herein; that he has read and knows the contents of the Amended Complaint and each of the causes of action therein alleged and of the foregoing amendments to the Amended Complaint; that said Amended Complaint is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to such matters, he believes it to be true; that the amendments to the Amended Complaint, insofar as the same relate specifically to him, are true of his own knowledge.

GEORGE J. LONDON

Subscribed and sworn to before me }
this 6th day of January, 1949. }

EDWARD J. SCANLON
Notary Public
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Notice.

DISTRICT COURT OF THE UNITED STATES,

FOR THE

EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT, *et al.*, Plaintiffs, *v.* JOSEPH W. FRAZER, *et al.*, Defendants.	Civil Action. File No. 7354.

To:

BUTZEL, EAMAN, LONG, GUST & KENNEDY, Esqs.,
1881 National Bank Building,
Detroit 26, Michigan,
Attorneys for Kaiser-Frazer Corporation, and certain individual defendants.

BODMAN, LONGLEY, BOGLE, MIDDLETON & ARMSTRONG, Esqs.,
1400 Buhl Building,
Detroit 26, Michigan.
Attorneys for Graham-Paige Motors Corporation.

GEORGE E. BRAND, Esq.,
3709-3723 Barlum Tower,
Detroit 26, Michigan,
Attorney for The Permanente Metals Corporation and Permanente Products Company.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

DYKEMA, JONES & WHEAT, Esqs.,
2746 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Otis & Co.

Gentlemen:

PLEASE TAKE NOTICE that upon the trial of the above entitled action, the undersigned, on behalf of the above named plaintiffs, will move to amend and supplement the amended complaint herein so that same shall include the following allegations and prayers for relief:

I.

Following Paragraph 40 of said amended complaint:

40a. Thereafter and in or about the month of October, 1949, said defendant, Permanente Metals, then being in possession of the Trentwood Rolling Mill under said lease, acquired title to said plant from the lessor thereof or some other agency of the United States, and at or about the same time, the said defendant, then being in possession of the Mead and Baton Rouge plants, under leases, also obtained title to said plants, all as more fully described hereinafter, the purchase price being paid by payment of a small percentage of the total thereof and by agreement to pay the balance in installments partly in cash and partly through the delivery to the government of aluminum ingots.

40b. Under the letter agreement referred to in Paragraph 38 of the amended complaint, which was dated March 27, 1946, the War Assets Administration also agreed to lease, not to Kaiser-Frazer, but to Kaiser Cargo, Inc., a company in which Henry J. Kaiser and his associates were and still are officers and directors and principal or sole stockholders (and the name of which was subsequently

changed in 1946 to Kaiser Fleetwings Inc., and again later changed to Kaiser Metal Products Corporation), the so-called Spokane, Washington reduction plant, at Mead, Washington, near Spokane, which plant is herein referred to as the Mead plant. Furthermore, on August 16, 1946, Kaiser Cargo, Inc., obtained from War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser Cargo, Inc., a plant at Baton Rouge, Louisiana, herein referred to as the Baton Rouge plant, with facilities for the production of alumina from bauxite ore. Kaiser Cargo, Inc., assigned these agreements to Permanente Metals, which, pursuant thereto, obtained leases on said plants (on the Mead plant on July 19, 1946, and on the Baton Rouge plant on November 1, 1946), and thereafter and in or about October, 1949, said defendant, Permanente Metals, acquired title to said plant, along with the Trentwood plant, as alleged in Paragraph 40a hereof.

40c. The said three (3) plants, namely, the Trentwood plant, the Mead plant and the Baton Rouge plant, had been built by the United States Government in 1942 and 1943, and they were designed to permit an integrated use and operation. The Baton Rouge plant, as aforesaid, had facilities for the production of, and did produce, alumina from bauxite ore. The Mead plant was designed to and did produce primary aluminum in pig form from alumina produced at the Baton Rouge plant. At the Trentwood plant, the aluminum pig produced at the Mead plant was and is remelted and manufactured into finished or semi-finished aluminum products. In making the aforesaid agreements and leases, and ultimate sales of the said plants, it was the purpose of the government to foster a new and fully integrated enterprise which could become a completely independent operator, so that competition in the aluminum industry could be effectually furthered, and said plants were all put in operating condition at the cost and expense

of the government, and without expense to Permanente Metals.

40d. In or about the month of June, 1949, and to supplement the operations of Permanente Metals at the Trentwood, Mead and Baton Rouge plants, Permanente Metals acquired from the United States, through War Assets Administration, an aluminum rod and bar mill at Newark, Ohio.

40e. Not only was the letter of intent of March 27, 1946, with respect to the Trentwood plant made with Kaiser-Frazer, but to the knowledge of the defendants, the opportunities to obtain leases on the Mead and Baton Rouge plants, and ultimately to acquire said Trentwood, Mead and Baton Rouge plants, and the opportunity to acquire the aforesaid mill at Newark, Ohio, were opportunities which were offered to or were readily available to Kaiser-Frazer, and they were opportunities which in the light of the above facts and others, and particularly the existence of a large demand for aluminum products, and the possession of or availability to Kaiser-Frazer of the resources and facilities necessary to exploit said opportunities, and the assurance of substantial profits, should and could have been taken and exercised on behalf of Kaiser-Frazer, and would have been so taken and exercised, if the directors and officers of Kaiser-Frazer had properly exercised their fiduciary duties to Kaiser-Frazer. In causing said Kaiser-Frazer to relinquish or be deprived of said opportunities and in enabling them to be taken and exercised on behalf of Kaiser Cargo, Inc. (now known as Kaiser Metal Products Corporation), and Permanente Metals, the directors and officers of Kaiser-Frazer acted with gross negligence, with reckless indifference to the rights and interests of Kaiser-Frazer, and in violation of their duties to Kaiser-Frazer, and in wrongful and fraudulent conspiracy with Kaiser Cargo, Inc. (now known as Kaiser Metal Products

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Corporation), and Permanente Metals, and the officers and directors thereof, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser companies which had the majority stock interests in Permanente Metals, the aforesaid common directors of Kaiser-Frazer and Permanente Metals and other business associates of the Kaisers. The aforesaid profits made by Permanente Metals, referred to in Paragraph 39 of the amended complaint, and the profits thereafter made, were enabled to be made in part through the operations of the Mead and Baton Rouge plants and the mill at Newark, Ohio, as well as the operations of the Trentwood plant.

The following paragraph is to be substituted for Paragraph 41 contained in said amended complaint:

41. By reason of the premises, Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds the said Trentwood, Mead and Baton Rouge plants and the Newark, Ohio, mill in trust for Kaiser-Frazer; that title to said plants and mill be assigned, transferred and set over to and for the benefit of Kaiser-Frazer, upon the assumption by Kaiser-Frazer of the obligations incurred under any purchase agreements by Permanente Metals; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operations of said plants and mill, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser Companies", as aforesaid; and that all defendants similarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transactions herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned sub-

sidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits and damages herein requested will be facilitated thereby.

II.

To add a Fourth Cause of Action to said amended complaint, which said cause of action shall read as follows:

For a Fourth Cause of Action against Defendants, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., and Kaiser-Frazer Corporation:

46. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 1 (as heretofore amended by "Amendments to Amended Complaint", filed and served January 12, 1949), 2 and 4 of the amended complaint as though herein set forth at length.

47(a) The directors and officers of Kaiser-Frazer have caused Kaiser-Frazer to make various arrangements with Kaiser Fleetwings Inc., a company owned and controlled by Henry J. Kaiser and his business associates, as aforesaid (the name of which was theretofore Kaiser Cargo, Inc., and which has since been changed to Kaiser Metal Products Corporation), under which said Kaiser Fleetwings Inc. performed for Kaiser-Frazer various aspects of the work necessary in the manufacture of automobiles and the parts thereof, including doors and deck lids, and under which said Kaiser Fleetwings Inc. sold to Kaiser-

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Frazer doors and deck lids for use in automobiles manufactured by Kaiser-Frazer. In connection with said agreements, and pursuant thereto, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to acquire and furnish to Kaiser Fleetwings Inc. machinery and other equipment aggregating millions of dollars in cost and value for use by Kaiser Fleetwings Inc. in manufacturing said automobile parts for Kaiser-Frazer. In these transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the work done by Kaiser Fleetwings Inc. for Kaiser-Frazer, and the products sold to Kaiser-Frazer by Kaiser Fleetwings Inc., prices which were far in excess of the fair and reasonable value of said work, and the market or fair and reasonable value of said products, and in addition Kaiser-Frazer could and should have obtained said work and products from other sources without the substantial investment in machinery and equipment acquired and furnished for the use of Kaiser Fleetwings Inc., as aforesaid.

(b) In causing Kaiser-Frazer to make said arrangements with Kaiser Fleetwings Inc., the directors and officers of Kaiser-Frazer were acting in a manner detrimental to the interests of Kaiser-Frazer for the benefit, advantage and unjust enrichment of Kaiser Fleetwings Inc., and said directors and officers of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and said acts and activities and the arrangements made, as aforesaid, resulted in damages to Kaiser-Frazer, and a waste of its funds and assets in an amount now not known to plaintiffs, but for which the individual defendants are accountable, and should be compelled to account to Kaiser-Frazer.

48. In or about the month of June, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make an agreement with Graham-Paige Motors Corp., wherein

and whereby the funds, moneys and credits of Kaiser-Frazer were used in whole or in part to finance a business venture on the part of Graham-Paige, at Long Beach, California, for the manufacture of farm equipment. Kaiser-Frazer had no interest in said venture, nor any expectancy therein, and said arrangement to finance said venture was wholly outside the legitimate scope of the activities of Kaiser-Frazer. The use of the moneys, funds and credits of Kaiser-Frazer in connection with said venture was intended to advantage Graham-Paige at the expense of and to the detriment of Kaiser-Frazer, and the acts of the directors and officers of Kaiser-Frazer in causing Kaiser-Frazer's moneys, funds and credit so to be used, were wrongful and fraudulent and in violation of their fiduciary duties to Kaiser-Frazer, and have resulted in damage to Kaiser-Frazer, and a waste of its funds and assets for which the individual defendants herein are accountable to and should be made to account to Kaiser-Frazer.

49. (a) Under date of April 1, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to lease from the United States Government certain buildings located at Long Beach, California (formerly part of an aircraft manufacturing plant owned by the government, and operated by Douglas Aircraft Company). Said lease was for a term of four years, and eleven months, with an option to renew for an additional five year term. The annual rent was $115,793 for the first year, $173,690 for the second year and $231,856 for each year thereafter. By letter of intent dated February 12, 1947, the War Assets Administration agreed to enter into an amendment under which certain additional property would be included in the leased premises, the rental would be increased $63,836 per annum, and Kaiser-Frazer would be granted an option to purchase the property for $3,000,000. Said

property was leased for the purpose of having it available as a west coast assembly plant for Kaiser-Frazer. The directors and officers of Kaiser-Frazer caused approximately $2,200,000 of the moneys of Kaiser-Frazer to be expended for the equipment of said plant. In the Fall of 1946, work on said plant was suspended and since that time, nothing further has been done or performed in connection therewith. However, the rent at the rates provided as above have continued to run and have continued to be paid by Kaiser-Frazer.

(b) In causing Kaiser-Frazer to make the aforesaid lease, the directors and officers of Kaiser-Frazer acted negligently, improvidently and recklessly and without sufficient or proper evaluation of the needs of Kaiser-Frazer and the ability of Kaiser-Frazer to properly equip said plant in order to enable it to function and to put it in effective operation. As a result of said transaction, Kaiser-Frazer has sustained damages running into millions of dollars for which the directors and officers of Kaiser-Frazer are accountable to and should be made to account to Kaiser-Frazer.

50. (a) In or about the months of May and June, 1946, and from time to time thereafter until the Fall of 1947, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases of steel ingots from Kaiser Steel Co., Inc. (the name of which has since been changed to Kaiser Steel Corporation), a corporation owned and controlled by Henry J. Kaiser and his business associates, in quantities which were excessive and not needed in the business.

(b) In or about the Fall of 1947, and from time to time thereafter, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases and continue to purchase from said Kaiser Steel Co., Inc., slab steel in

quantities which were excessive and not needed in the business of Kaiser-Frazer.

(c) In the aforesaid transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the steel sold to Kaiser-Frazer by said Kaiser Steel Co., Inc., prices which were far in excess of the market or the fair and reasonable value thereof. In causing Kaiser-Frazer to engage in said transactions with said Kaiser Steel Co., Inc., the directors of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and with the intent of benefiting and advantaging Kaiser Steel Co., Inc., at the expense of and to the detriment of Kaiser-Frazer. Said transactions have resulted in damage to Kaiser-Frazer in an amount now unkonwn to plaintiffs, but for which said individual defendants are accountable to and should be made to account to Kaiser-Frazer.

51. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 28, 29, 30 and 31 of the amended complaint as though herein set forth at length.

III.

With respect to the prayers for relief substitute the following for Paragraph (b) of the prayer for judgment, as contained in the amended complaint:

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation, hold the Trentwood, Mead and Baton Rouge plants, and the mill at Newark, Ohio, in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said plants and mill to and for the benefit of defendant, Kaiser-Frazer Corporation, upon the assumption by Kaiser-Frazer Cor-

poration of the obligations incurred under any purchase agreements by The Permanente Metals Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of said plants and mill and the sale of products manufactured thereat; and that the defendants and each of them, other than defendant Kaiser-Frazer Corporation, be directed to account for all profits realized by them and all damages sustained by Kaiser-Frazer Corporation as the result of the wrongful and fraudulent conversion of the said plants and mill, and the opportunity to profit therefrom, from Kaiser-Frazer Corporation to The Permanente Metals Corporation.

Dated, October 22, 1949.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 LaSalle Street,
Chicago 3, Illinois.
Attorneys for Plaintiffs.

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

To All Stockholders of the Defendant,
KAISER-FRAZER CORPORATION:

By order to show cause dated November 9, 1949, the undersigned Judge of the United States District Court for the Eastern District of Michigan, directed the parties to the above action and the stockholders of Kaiser-Frazer

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Corporation to show cause why, among other things, a certain agreement dated October 25, 1949 (Exhibit No. 1 annexed to said order to show cause) should not be approved, carried out and put into effect.

Said agreement provides in part as follows:

"WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,503.30."

Commencing on December 6, 1949, hearings were held before this Court pursuant to said order to show cause and the following additional facts, among others, appeared:

1. On November 7, 1949, the guaranties of Henry J. Kaiser Company and Kaiser Industries, Inc.

referred to in the settlement agreement were delivered to Reconstruction Finance Corporation and the pledge of collateral referred to in said agreement was then made;

2. On November 9, 1949, $12,000,000 was received by Kaiser-Frazer Corporation from Reconstruction Finance Corporation on the $34,400,000 loan referred to in said agreement; to date a total of $14,017,897.41 has been received; and additional amounts may be received by Kaiser-Frazer Corporation from Reconstruction Finance Corporation on said loan prior to the order of the Court on the settlement agreement;

3. On November 7, 1949, Kaiser-Frazer Sales Corporation executed all papers necessary to obtain the revolving line of credit referred to in said agreement, and on November 9, 1949, received from the Reconstruction Finance Corporation $7,118,071 thereunder, which is the maximum borrowing under said revolving line of credit to date; further borrowing may be made under said revolving line of credit prior to the order of the Court on the settlement agreement;

4. Purchase from Kaiser-Frazer Corporation by Kaiser Metal Products, Inc. of the presses and related equipment referred to in the settlement agreement was made on December 13, 1949. The purchase price of $879,503.30 has been paid from the proceeds of a $4,500,000 insurance company loan secured by a mortgage executed by Kaiser Metal Products, Inc. on its plant and equipment, and recorded December 12, 1949, which mortgage includes said metal presses and related equipment.

Those favoring the proposed settlement contend that the notice to stockholders dated November 9, 1949, was adequate, fair, complete and clear; while those who oppose the proposed settlement contend

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

that said notice was inadequate, unfair, fraudulent and misleading. Without making any determination thereon, and without enumerating the many contentions, claims, and reasons, pro and con, advanced by each of the several groups present, particularly as to whether the consideration for the proposed settlement was, or is, in truth and in fact, as represented therein, this Court has directed that this additional notice be sent to all stockholders of Kaiser-Frazer Corporation for their information.

You are also advised that this settlement, if approved, will settle all claims that are asserted in the several stockholders suits brought against Kaiser-Frazer Corporation, *et al.*

You are hereby further advised that the hearing will be resumed on January 17, 1950, at ten o'clock in the forenoon, in my Courtroom, 712 Federal Building, Detroit, Michigan. At that time this Court intends to proceed with the taking of testimony which he believes is necessary before the sufficiency and contents of the original notice, and all other questions, including approving or disapproving of the proposed settlement agreement, may be properly weighed, passed upon and determined. Said hearing may be adjourned from time to time without further notice other than by the announcement of the adjourned date at the hearing.

Dated: Detroit, Michigan, December 20, 1949.

FRANK A. PICARD,
United States District Judge

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

Order Approving Compromise and Settlement and Dismissing Action.

The petition of the plaintiffs and of the defendant Kaiser-Frazer Corporation, filed herein on November 9, 1949, for approval of the agreement of settlement and

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

compromise thereto annexed as Exhibit 1 and for dismissal of this action having duly and regularly come on for hearing; and the Court having taken the proofs of the parties who appeared in support of said petition and in opposition thereto; and having heard the arguments and read the briefs of counsel; and the petitioners and other parties to said agreement having consented that the general release provisions contained in paragraph 2 of said agreement shall be limited to the matters concerning or relating to: (1) the transactions and acts described in subdivisions (a) to (i) of paragraph 2 of said agreement; (2) the claims, charges, transactions and allegations set forth in the amended complaint, the amendments thereto, and the notice to amend and supplement the amended complaint (hereinafter collectively called "amended complaint"); and (3) the Muntz Car Company transactions; and due deliberation having been had on all the foregoing; and

It appearing to the satisfaction of the Court that Rule 23 (c) of the Rules of Civil Procedure has been fully complied with; that due and adequate notice of these proceedings has been given and full opportunity to be heard has been afforded; that said agreement of settlement and compromise was arrived at fairly and in good faith; that the consideration therein provided to be paid to defendant Kaiser-Frazer Corporation is fair, reasonable and adequate; and that said agreement is fair and equitable and in the best interests of said defendant and all of its stockholders; and this Court having duly rendered its opinion containing its findings of fact and conclusions of law and determining that said agreement should be approved.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That said agreement of settlement and compromise (a copy of which is attached hereto as Exhibit 1 and made a part hereof) be, and the same hereby is, approved and

confirmed; provided, however, that the general release provisions of paragraph 2 of said agreement shall be, and they hereby are, limited to the matters concerning or relating to: (1) the transactions and acts described in subdivisions (a) to (i) of paragraph 2 of said agreement; (2) the claims, charges, transactions and allegations set forth in the amended complaint; and (3) the Muntz Car Company transactions.

2. That the parties to said agreement of settlement and compromise be, and they hereby are, directed to carry out and perform said agreement, and the same is hereby declared to be in full force and effect and binding upon the parties thereto, including defendant Kaiser-Frazer Corporation and each and all of its stockholders. All other provisions of paragraph 1 of said agreement having been performed, payment of the sum of Five Hundred Thousand Dollars ($500,000) to defendant Kaiser-Frazer Corporation pursuant to subdivision (c) of paragraph 1 of said agreement shall be made within ten (10) days after all rights of appeal from this order shall have expired, unless appeal therefrom shall have been taken, in which latter event such payment shall be made within ten (10) days after the date on which this order stands finally affirmed or after the date on which such appeal is finally dismissed.

3. That upon said payment being made to it, Kaiser-Frazer Corporation shall execute, acknowledge and file with the Clerk of this Court its written receipt for said payment, and thereupon this action, forthwith and without further order of the Court, stands dismissed with prejudice and without costs, subject only to reservation of jurisdiction in this Court for the purpose of hearing and determining applications for allowances of fees and expenses and directing the payment thereof and of enforcing the provisions of this order.

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

4. That applications for allowances of fees and expenses for plaintiff's attorneys and applications, if any, for allowances of fees and expenses for attorneys for other stockholders be filed and served upon the attorneys for the defendant Kaiser-Frazer Corporation on or before November 10, 1950, and that a hearing thereon be held at such time as this Court may hereafter fix. Said application for fees shall be itemized and accompanied by an affidavit stating with particularity all monies or valuable consideration heretofore received by applicant, his firm, or any member thereof and/or any other person for or in his or its behalf, directly or indirectly, by way of payment of expenses, fees, or for any other purpose in connection with this litigation, and all monies or other valuable consideration promised or expected to be paid to said applicant, his firm, or any member thereof and/or any other person for or in his or its behalf, directly or indirectly, in connection therewith, together with the names and addresses of all persons, firms or corporations who or which have paid, are paying or promise to pay any of such sums or other valuable consideration and that no person, firm or corporation has paid, is obliged to pay, or is expected to pay any money or other valuable consideration to the applicant or any member of any firm of which the applicant is a member except as stated in said affidavit in connection or relating to said above litigation.

Done at Detroit, Michigan, this 13th day of September, A. D. 1950.

FRANK A. PICARD,
United States District Judge.

Exhibit 1 to this order is the agreement constituting part of Exhibit 1 to the moving affidavit.

Exhibit 4, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Notice of Hearing

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

Civ. No. 45-750.

TO THE STOCKHOLDERS OF KAISER MOTORS CORPORATION (formerly Kaiser-Frazer Corporation):

By order of Hon. , Judge of the United States District Court for the Southern District of New York, dated November , 1953, a hearing will be held in Federal Court at Room 506 of the United States Court House, Foley Square, City, County and State of New York on the day of December, 1953 at o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, upon the defendants' application for summary judgment dismissing the action upon the ground that a settlement agreement approved by the

Exhibit 4, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

United States District Court for the Eastern District of Michigan, Southern Division, constitutes a release and discharge of the claims and causes of action asserted in this action and bars any further proceedings in this action.

A copy of said order and the supporting papers are now on file in the office of the Clerk of said Court.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or to the stockholders of Kaiser Motors Corporation other than the announcement of the adjourned date at the hearing.

Dated: New York, New York
November , 1953.

WILLKIE OWEN FARR GALLAGHER & WALTON
Attorneys for Defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation.

CORBIN, BENNETT & DELEHANTY,
Attorneys for Defendants Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown.

Affidavit of Alfred Verderosa, with Notice to Stockholders.

Notice to Stockholders

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation, Plaintiff, *against* HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, C. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION, Defendants. Civ. No. 45-750.

NOTICE OF HEARING.

TO THE STOCKHOLDERS OF KAISER MOTORS CORPORATION (formerly Kaiser-Frazer Corporation):

By order of Hon. Thomas F. Murphy, Judge of the United States District Court for the Southern District of New York, dated November 24, 1953, a hearing will be held in Federal Court at Room 506 of the United States Court House, Foley Square, City, County and State of New York on the 10th day of December, 1953 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, upon the defendants' application for summary judgment dismissing the action upon the ground that a settlement agreement approved by the United States District Court for the Eastern District of Michigan, Southern Division, constitutes a release and discharge of the claims and causes of action asserted in this action and bars any further proceedings in this action.

A copy of said order and the supporting papers are now on file in the office of the Clerk of said Court.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or

to the stockholders of Kaiser Motors Corporation other than the announcement of the adjourned date at the hearing.

Dated: New York, New York, November 25, 1953.

WILLKIE OWEN FARR GALLAGHER & WALTON,
Attorneys for Defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation.

CORBIN, BENNETT & DELEHANTY,
Attorneys for Defendants Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, }

ALFRED VERDEROSA, being duly sworn, states that he is Advertising Clerk of THE WALL STREET JOURNAL, a newspaper published in the City and County of New York and that the Notice of which the annexed is a copy has been regularly published in the said THE WALL STREET JOURNAL for One (1) insertion 12/2 in the year of our Lord Nineteen Hundred and 53.

ALFRED VERDEROSA

Sworn to before me this
2 day of Dec. 1953

SAMSON TAUBER

SAMSON TAUBER, Notary Public
State of New York No. 03-9289150
Qualified in Bronx County
Certificates filed in the following offices:
County Clerk, New York, Kings
Register: New York, Bronx & Kings

[NOTARIAL SEAL]

PROPOSED Order.

[SAME TITLE.]

Upon the annexed affidavit of Lewis M. Dabney, Jr., verified the 4th day of December, 1953, and all prior proceedings herein, it is

ORDERED, that the return day for defendants' motion for summary judgment herein be adjourned from December 10, 1953, to January 12, 1954, at 10:00 o'clock in the forenoon of that date; and it is further

ORDERED, that answering affidavits shall be served on or before the 8th day of January, 1954; and it is further

ORDERED, that service of a copy of this order and the moving affidavit upon the attorneys of record for the defendant Kaiser-Frazer Corporation, and for the individual defendants herein, on or before Tuesday, December 8, 1953, be deemed good and sufficient service upon said defendants.

Dated: New York, N. Y., December 4th, 1953.

U. S. D. J.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

[SAME TITLE.]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

LEWIS M. DABNEY, Jr., being duly sworn, deposes and says:

I am one of the attorneys of record for the plaintiff in the above case, and I make this affidavit in support of a motion to adjourn to a day certain the return day, and the day on which answering affidavits must be served, in response to defendants' motion for summary judgment.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

This motion was brought on by an *ex parte* order to show cause signed by Honorable Thomas F. Murphy, U. S. D. J., returnable December 10th, and fixing December 8th as the day by which answering affidavits should be served. Plaintiff, for reasons hereinafter stated, requests an adjournment of at least one month as to both of said dates.

This case presents a novel and important question on which there is little or no direct authority, namely, whether a settlement, pursuant to Rule 23(c) FRPC, of a stockholder's derivative action in a different jurisdiction is *res judicata* in the court in which a prior action asserting the same claim was filed and is pending, so as to prevent the trial on the merits of such prior action. Of course, a plea of *res judicata* brings before the court to which it is made the question of just what was decided in the other jurisdiction. The complications of this case are such that adequately to advise the Court, by a documented affidavit, as to all pertinent facts and as to just what was presented and decided in the proceeding leading to approval of the settlement now pleaded as *res judicata*, and adequately to brief and present the applicable law, will require at least a month, taking into consideration the intervening Christmas holidays.

This case is one of a number of stockholders' derivative actions brought on behalf of Kaiser-Frazer Corporation (Kaiser-Frazer) which were involved in the settlement in Detroit which is now pleaded in bar of this action. Such other cases, all of which were brought before the *Pergament* case (settlement of which was approved in Detroit and is now pleaded in bar), are now pending in federal and state courts in different jurisdictions. Counsel for the stockholder plaintiffs in these cases have cooperated, and intend to continue to cooperate, with counsel for plaintiff herein. It is obvious that if the present motion is granted, similar motions will be presented in other jurisdictions. Accordingly, when I was first advised of the present motion, upon my return from out of town to my office on November 30th,

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

I immediately notified my out of town associates in such other cases and requested them to get in touch with their respective clients and with each other, and to advise with me as to whether the motion herein should be resisted. Naturally, such a decision requires a careful examination of the law of *res judicata* as applied in this field, in which apparently few direct precedents exist. Under these circumstances, we all agreed that further time was required in order to decide the course to be recommended to our clients and to obtain their decision.

Thereupon, one of my associates telephoned opposing counsel and requested a month's adjournment in order to determine whether to oppose the motion and, if the determination was to oppose, to prepare answering papers in opposition. Such counsel refused to agree to any adjournment unless he was then and there advised whether there would be opposition—which was, of course, impossible. Accordingly, this application is made.

The following is a bare outline of the facts that will have to be assembled, presented by affidavit, and adequately documented, if it is decided to oppose the motion:

1. This case was one of three cases collectively presenting eight causes of action on behalf of Kaiser-Frazer and against its management arising from various alleged acts of fraud and mismanagement to the detriment of Kaiser-Frazer. Shortly after these cases were filed, the *Pergament* action (settlement of which pursuant to Rule 23(c) is now pleaded in bar) was filed in Detroit by other stockholders. This action set forth, originally and by amendment filed immediately prior to the settlement, all the claims previously set forth in the other stockholder actions. Without notice to plaintiff in these actions, or to their counsel, settlement was made of the *Pergament* action with the declared intention of barring the prosecution of the other actions.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

2. This settlement was brought on, in Detroit, for approval pursuant to Rule 23(c) by order to show cause. Plaintiffs in the other actions, including the plaintiff herein, appeared and resisted approval of the settlement. Among the grounds which they urged in Detroit, and which will be here urged if it is decided to resist the motion herein, is that the settlement was procured by fraud. In my view of the Detroit proceedings and that of my associates, the effect of the Detroit decision, as modified on appeal, was either that fraud existed, or that the Court did not have to pass, and did not pass, on the issue of fraud. The District Judge, as I read his opinion, refused to find on the matter of fraud. On appeal, one judge found that fraud existed, and the other two judges either agreed there was fraud or found it unnecessary to decide the question. If my view of the Detroit record, including the record on appeal, is correct, the issue of fraud has been determined *adversely* to the defendants or, as a minimum, is open to independent determination by this Court. Naturally, defendants have a different interpretation of the Detroit record; and an adequate presentation of these differences will require careful and elaborate preparation on both sides.

3. The claim in the instant case was settled in bulk with seven other claims presented in two other cases.

* * * * * *

LEWIS M. DABNEY, JR.

Sworn to before me this 4th day of December, 1953.

CARRYL MORITZ
Notary Public.

CARRYL MORITZ
Notary Public, State of New York
No. 03-8020000
Qualified in Bronx County
Certificates filed in the following offices:
County Clerk: Bronx, New York
Register: Bronx, New York
Commission Expires March 30, 1954.

Reply Affidavit of Mark F. Hughes, in Support of Motion for Summary Judgment.

[Same Title.]

State of New York,
County of New York, } ss.:

Mark F. Hughes, being duly sworn, makes this reply affidavit.

The answering affidavit concedes that, in terms, the agreement of settlement approved in the *Pergament* action by the Federal District Court in Michigan and on appeal, releases and discharges the claim asserted in this action. Mr. Dabney asserts, however, that the agreement was obtained by constructive or actual fraud and lack of arm's-length bargaining, that that issue was not determined by the District Court in Michigan and that the plaintiff may raise it now and thus defeat the intended purpose and effect of the settlement agreement and the extended proceedings before the District Court and on appeal approving it.

If the question of fraud and lack of arm's-length bargaining was raised by the plaintiff herein before Judge Picard and determined against him, the opposition to this motion is frivolous and the motion must be granted. Whether that question was raised and decided depends not upon what Mr. Dabney or deponent may say in conflicting affidavits but upon the *record* in the District Court in the *Pergament* case and the *record* on appeal before the Court of Appeals which affirmed the District Court and the *record* before the Supreme Court of the United States when it denied review of the affirmance.

Accordingly, deponent begs leave to refer to and hereby incorporates herein by reference as Exhibit "5" the eleven volumes of the printed record* on appeal in *Pergament*,

* This record slightly condensed the proceedings before the District Court. This affidavit sets forth a few portions of the transcript not in the printed record.

et al. v. *Frazer, et al.*, 203 F. 2d 315, cert. denied October 12, 1953. Deponent will submit a copy of that record to this Court upon the argument of this motion. The attorneys for the plaintiff have a copy.

After the hearings before Judge Picard and before his decision and opinion approving the settlement was rendered, the parties favoring and opposing the settlement submitted briefs. In the Court of Appeals, the parties also filed briefs. Following the affirmance, the plaintiff herein joined with others in a petition to the Supreme Court for a writ of certiorari. Opposing briefs were filed in that Court. These documents supplement the record in each court and further establsh what issues were raised and determined and affirmed in the *Pergament* case. Accordingly, deponent begs leave to refer to and hereby incorporates herein by reference briefs in each of the aforesaid courts with exhibit numbers as follows:

In the District Court.

Brief on Behalf of Plaintiffs as Co-Proponents of the Settlement Agreement of October 25, 1949, Exhibit "6";

Brief on Behalf of Individual Defendants and Defendant, Kaiser-Frazer Corporation, Exhibit "7";

Brief on Behalf of Objecting Stockholders, Exhibit "8";

Reply Brief on Behalf of Plaintiffs, Exhibit "9";

Reply Brief on Behalf of Objecting Stockholders, Exhibit "10".

In the Court of Appeals for the Sixth Circuit.

Appellant's Brief, Exhibit "11";

Brief on Behalf of Appellees, Pergament and London, Exhibit "12";

Reply Affidavit of Mark F. Hughes, in Support of Motion for Summary Judgment.

Brief on Behalf of Defendants-Appellees, Joseph W. Frazer, *et al.*, Exhibit "13";

Appellant's Reply Brief, Exhibit "14".

In the Supreme Court.

Petition for Writ of Certiorari, Exhibit "15";

Brief of Pergament and London in Opposition to Petition for Writ of Certiorari, Exhibit "16";

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Joseph W. Frazer, *et al.*, Exhibit "17";

Reply Brief on Behalf of Petitioners, Exhibit "18";

Reply Brief on Behalf of Respondents, Joseph W. Frazer, *et al.*, Exhibit "19".

These exhibits will be submitted to the Court upon the argument. Plaintiff's counsel has copies.

The mandate of the Court of Appeals on its decision affirming the District Court's order approving the settlement and dismissing the *Pergament* action with prejudice was stayed pending the decision of the Supreme Court on the application for a writ of certiorari. It went down to the District Court for the Eastern District of Michigan shortly after the denial of certiorari and is now on file in the office of the Clerk of that Court. A copy of said mandate is hereto annexed marked Exhibit "20".

As the brief which we shall submit in support of the motion demonstrates in detail, the actual *record* shows (1) that objecting stockholders including the plaintiff herein and his counsel raised and litigated the charge that the settlement agreement was not arrived at by arm's-length bargaining in good faith, (2) that the District Court considered that charge and ruled against the objectants, finding that there was no "collusion, fraud, concealment or unfair dealing in arriving at the compromise" and

that "there was 'arms-length bargaining'" (Pergament Record, Vol. 1, pp. 240, 242; 93 F. Supp. 13, 21), (3) that the Court of Appeals for the Sixth Circuit affirmed that determination, and (4) that, despite the repetition of the charge in the petition for a writ of certiorari, the Supreme Court denied the petition. In an attempt to support its present claim that that charge was not determined, the answering affidavit relies upon and cites copiously from a *dissenting* opinion in the Court of Appeals. It is impossible to understand how the answering affidavit can allege (Answering Aff. p. 7) that "as regards fraud, the District Judge failed to make findings * * *" in the light of the foregoing quotations from his opinion and the recital in his order "that said agreement of settlement and compromise was arrived at fairly and in good faith" (Hughes' Aff. Ex. 3, p. 2; Pergament Record, Vol. 1, p. 291).

On one occasion during the hearings before Judge Picard, Mr. Dabney made the following statement which was not included in the printed record:

> "Now the necessary effect of the settlement in this case, if there is a settlement, is to destroy the Stella action. There is no sense to it otherwise."
>
> (Stenographic transcript of proceedings before Picard, J., p. 469.)

In the Court of Appeals, counsel for these same objectants stated, "the settlement approved below will forever release the defendants from their wrongdoing * * *" (Transcript of Argument, Court of Appeals, 2/20/52, p. 5).

The answering affidavit laboriously argues that in approving the settlement the District Court was acting in an administrative rather than a judicial capacity (Answering Aff., pp. 8, 13-28). Deponent believes that it is not the proper function of this replying affidavit to deny item by item the misstatements and misinterpretations of, and omissions from the record in the course of the answering affidavit. The *record* itself plainly shows that the propo-

nents of the settlement invoked the Court's jurisdiction and power under Rule 23(c) of the Rules of Civil Procedure and that the District Court entertained their application and proceeded to a determination thereon pursuant to the jurisdiction and duty imposed upon it by that Rule and approved the settlement only after being satisfied that that Rule had been fully complied with (Pergament Record, Vol. 1, pp. 148, 291; Hughes' Aff., Ex. 1, p. 5, Ex. 3, p. 2). It also shows that the criticims of the way in which the District Judge conducted the proceedings are but repetitions of similar criticisms in the *Pergament* record and briefs (Ex. 11, pp. 167-175).

The answering affidavit (pp. 29-30) attempts to raise upon this motion the adequacy of the settlement. This, of course, was one of the issues raised and passed upon both in the District Court and on appeal in the *Pergament* case (Pergament Record, Vol. 1, pp. 174-6, 216-7, 247-256, 296-8; Ex. 8, pp. 127-145; Ex. 11, pp. 147-160). It cannot be re-litigated.

Following the entry of the order approving the settlement, counsel for the objectants, including the plaintiff herein, filed an application for an allowance for their services in opposing the approved settlement and for their expenses and disbursements allegedly amounting to $39,524.05. After denial of certiorari by the Supreme Court, they filed a supplemental application for fees. If, as plaintiff now contends on this motion, the proceedings before Judge Picard and on appeal, have not had the effect of barring further prosecution of this and the other stockholders' actions and were meaningless and ineffective, their counsel could not properly ask for compensation and reimbursement for the enormous amount of time and expense which they spent and incurred in opposing the settlement agreement on the merits. In this connection, their application alleges in part:

> "• • • they are the attorneys for the aforementioned objecting stockholders, whose derivative

> suits are being disposed of by the settlement herein, and they have participated in the instant proceedings in addition to conducting their own suits. * * *"
>
> (Application of Messrs. Schofield, *et al.* for compensation and reimbursement of expenses, p. 2.)

In their supplemental application the following statement appears (p. 1):

> "Among the more important issues decided by this Court [the District Court in Michigan], were the question of the propriety of the settlement negotiations, * * *"

While the plaintiff will scarcely dispute it, it is perhaps well to point out that following the denial of the petition for a writ of certiorari, the sum of $500,000 provided for in Section 1(c) of the settlement agreement was paid and receipted for as required by paragraph 3 of Judge Picard's order approving the settlement. Annexed hereto marked Exhibit "21" is a true copy of the receipt filed in the office of the Clerk of the District Court in Michigan. In accordance with the provisions of the order (Hughes' Aff., Ex. 3, p. 3) the *Pergament* action "stands dismissed with prejudice."

WHEREFORE, deponent prays that the defendant's motion for summary judgment be granted.

MARK F. HUGHES.

Sworn to before me this 7th day of January, 1954.

MAE J. CANNON
Notary Public, State of New York
No. 24-5595500
Qualified in Kings County
Certs. filed with Co. Clk's.
N. Y., Bronx, Queens, and
Register: Kings, N. Y., Bronx, Queens
Term Expires March 30, 1954.

Exhibit 20, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—Greeting:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between Jerome R. Pergament and George J. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, and Joseph W. Frazer, Henry J. Kaiser, *et al.*, Defendants, (D. C. No. 7354, Civil), an order was entered on the 13th day of September, 1950 approving compromise and settlement and dismissing action,

AND WHEREAS, the said James F. Masterson, Michael Stella, Eva Lefker and Otis & Co., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-one, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion

Exhibit 20, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Earl Warren, Chief Justice of the United States, the sixteenth day of October in the year of our Lord one thousand nine hundred and fifty-three.

CARL W. REUSS
Clerk, United States Court of Appeals
for the Sixth Circuit

Costs—(None)

Exhibit 21, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

UNITED STATES OF AMERICA

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

vs.

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No 7354

Receipt

Kaiser Motors Corporation (formerly known and designated herein as Kaiser-Frazer Corporation) hereby

Exhibit 21. Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

acknowledges receipt of the sum of Five Hundred Thousand Dollars ($500,000) from Kaiser Aluminum & Chemical Corporation (formerly known and designated herein as The Permanente Metals Corporation), said amount being paid and received pursuant to the provisions of the Order Approving Compromise and Settlement and Dismissing Action made and entered herein on September 13, 1950, and pursuant to that certain Agreement dated October 25, 1949, which was approved by said Order.

Dated: November 5, 1953.

KAISER MOTORS CORPORATION
(formerly KAISER-FRAZER CORPORATION)

By (sgd) S. A. GIRARD
Its Vice President

(SEAL)

True Copy

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.:

On this 5th day of November, 1953, before me, appeared S. A. GIRARD to me personally known, who, being by me duly sworn, did say that he is the Vice President of Kaiser Motors Corporation (formerly Kaiser-Frazer Corporation); and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said S. A. GIRARD acknowledged said instrument to be the free act and deed of said corporation.

(sgd) PATRICIA FLAHERTY
Notary Public in and for said
County and State

My Commission Expires: Jan. 21, 1956